75-1205

Supreme Court, U. S.
FILED
FEB 23 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States.

OCTOBER TERM, 1975.

JACOB AGGER,
PETITIONER,

v.

SEABOARD ALLIED MILLING CORP. AND
BAKERS MANAGEMENT CORP.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Table of Contents.

Opinion below	1
Jurisdiction	2
Questions presented	2
Statutory provisions involved	2
Statement of the case	4
Reasons for granting the writ	9
Conclusion	15
Appendix A	17
Appendix B	43
Appendix C	61

Table of Authorities Cited.

Cases.

Blennerhassett v. Sherman, 105 U.S. 100; 26 L. Ed. 1080 (1881)	11, 11-12, 13
Coder v. Arts, 213 U.S. 223; 29 S. Ct. 436; 53 L. Ed. 772 (1909)	10
Corn Exchange National Bank & Trust Co. v. Klauder, 318 U.S. 434; 63 S. Ct. 679; 87 L. Ed. 884 (1943)	14
Davis v. Schwartz, 155 U.S. 631; 15 S. Ct. 237; 39 L. Ed. 289 (1895)	10, 10-11
Dean v. Davis, 242 U.S. 438; 37 S. Ct. 130; 67 L. Ed. 419 (1917)	13, 15
In re Locust Bldg. Co., Inc. 299 F. 756 (2d Cir. 1924), cert. den. 265 U.S. 590; 44 S. Ct. 635; 68 L. Ed. 1194 (1924)	11n.
Twyne's Case, 3 Coke 80 [75 Eng. Rep. 661 (1571)]	11
Van Iderstein v. National Discount Company, 277 U.S. 575; 33 S. Ct. 343; 57 L. Ed. 652 (1913)	10
Wecker v. National Enameling and Stamping Company, 204 U.S. 176; 27 S. Ct. 184; 51 L. Ed. 430 (1907)	14-15
Western Tie and Timber Company v. Brown, 196 U.S. 502; 25 S. Ct. 339; 49 L. Ed. 571 (1905)	15
Wilson v. City Bank, 17 Wall. 473; 21 L. Ed. 723 (1873)	15

Statutes.

11 U.S.C.	§ 21a(2)	14
	§ 21b	14n.
	§ 29e	7n.
	§ 93g	7n.
	§ 96	2-3, 13
	§ 107d	2, 3-4
	§ 107d(1)(e)	10
	§ 107d(2)(a)(b)(c)	10n.
	§ 107d(2)(d)	2, 3
	§ 110c	8n.
	§ 110e	8n.
	§§ 301 et seq.	6
28 U.S.C.	§ 1254(1)	2

Bankruptcy Act

§ 3a(2) (11 U.S.C. § 21a(2))	14, 14n.
§ 3b (11 U.S.C. § 21b)	14n.
§ 11e (11 U.S.C. § 29e)	7, 8, 9
§ 57g (11 U.S.C. § 93g)	7, 8, 9
§ 60 (11 U.S.C. § 96)	2, 13, 14
§ 60a(2) (11 U.S.C. § 96a(2))	3, 13, 14
§ 67d (52 Stat. 875)	10n.
§ 67d(1)(e) (11 U.S.C. § 107d(1)(e))	10
§ 67d(2)(a)(b)(c) (11 U.S.C. § 107d(2)(a)(b)(c))	10n.
§ 67d(2)(d) (11 U.S.C. § 107d(2)(d))	2, 8, 9, 10, 12, 14
§ 67d(6) (11 U.S.C. § 107d(6))	10
§ 67e (30 Stat. 564)	10n., 12-13, 13
§ 70c (11 U.S.C. § 110c)	8
§ 70e (11 U.S.C. § 110e)	8
Chapter XI (11 U.S.C. §§ 301 et seq.)	6

Bankruptcy Act of 1867

§ 10 (18 Stat. 180)	11
§ 35 (14 Stat. 534)	11, 12

14 Stat. 534	11, 12
18 Stat. 180	11
30 Stat. 564	10n., 12
52 Stat. 875	10n.
11 Me. Rev. Stat. Ann. § 39-402	2
33 Me. Rev. Stat. Ann. §§ 201, 651, 653	2
Uniform Commercial Code (Maine)	2

Miscellaneous.

4 Collier, Bankruptcy ¶ 67.37[3] (14th ed.)	11
1 G. Glenn, Fraudulent Conveyances and Preferences § 289 (rev. ed. 1940)	10

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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Jacob Agger, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on November 25, 1975.

Opinions Below.

The opinions of the Court of Appeals and of the District Court for the District of Maine, not yet reported, appear as Appendix A and B, respectively. The opinion of the Bankruptcy Judge appears as Appendix C.

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on November 25, 1975, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether a real estate and a chattel mortgage taken, recorded, and filed in the name of a nominee of the secured party to secure antecedent debt, with the purpose and effect of concealing from other creditors of the now bankrupt mortgagor the fact that the mortgagee had received a preferential transfer within the meaning of § 60 of the Bankruptcy Act (11 U.S.C. § 96), are void against the bankruptcy trustee as fraudulent conveyances under § 67d(2)(d) of that Act (11 U.S.C. § 107d (2)(d)).

2. Whether mortgages so taken, recorded, and filed are properly perfected under Maine statutes requiring for perfection of real estate mortgages that they be recorded and cross-indexed in the names of the mortgagor and the mortgagee (33 Me. Rev. Stat. Ann. §§ 201, 651, 653) and under the Uniform Commercial Code, in force in Maine, requiring for perfection of a chattel mortgage the filing of a financing statement signed by the mortgagor and the mortgagee which is "not seriously misleading" (11 Me. Rev. Stat. Ann. § 39-402).

Statutory Provisions Involved.

United States Code, Title 11.

§ 96. *Preferred Creditors.* a.(1) A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

(2) For the purpose of subdivisions a and b of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. A transfer of real property shall be deemed to have been made or suffered when it became so perfected that no subsequent bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee. If any transfer of real property is not so perfected against a bona fide purchase, or if any transfer of other property is not so perfected against such liens by legal or equitable proceedings prior to the filing of a petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of the petition.

* * * * * * * *

b. Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. . . .

§ 107. *Liens and Fraudulent Transfers* . . .

d. . . . (2) Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent . . . (d) as to then existing and future creditors, if made or incurred with actual intent as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors.

* * * * * * *

(6) A transfer made or any obligation incurred by a debtor adjudged a bankrupt under this Act, which is fraudulent under this subdivision d against creditors of such debtor having claims provable under this Act, shall be null and void against the trustee, except as to a bona fide purchaser, lienor, or obligee for present fair equivalent value . . . .

Statement of the Case.

For some 30 to 40 years, respondent Seaboard Allied Milling Corporation (Seaboard Milling) had supplied flour to Cushman Baking Company (Cushman) on an open account basis, payable 30 days after delivery at Cushman's bakery in Portland, Maine. In the latter part of 1967, Cushman's account with Seaboard Milling was running substantially in arrears and, following conferences between Harry and Otto Bresky, president and vice-president of Seaboard Milling, and Charles Carolan, manager of Cushman, it was agreed that Seaboard Milling would make a $75,000 secured loan to Cushman and would extend $25,000 in credit for flour shipments payable 30 days after delivery.

Although most of the pertinent documents were earlier dated, the new financing arrangement was consummated on March 6, 1968, two days after Seaboard Milling had stopped shipments to Cushman because of the delinquency in its account and at a time when Cushman owed $73,951.67 to Seaboard Milling for previous flour shipments – the last delivery having been made in January, 1968. On March 6, Carolan called at the Boston office of Seaboard Milling's counsel, Slater, Goldman, Gillerman and Shack, and exchanged a three year note for $75,000, payable with interest in monthly installments of $2,333, a real estate mortgage on Cushman's property in Portland, and a chattel mortgage on Cushman's personal property in Portland, for a check payable to Cushman for $75,000. The note and the mortgages were prepared by counsel for Seaboard Allied and reviewed by counsel for Cushman before they were executed.

But the name of Seaboard Milling nowhere appears in the documentation of the financing arrangement. The $75,000 note executed by Cushman is payable to Bakers Management Corporation (Bakers Management). The secured party is named in both mortgages as Bakers Management. The real estate mortgage naming Bakers Management as mortgagee was recorded with the registry of deeds in Cumberland County, Maine, and financing statements covering the personalty and naming Bakers Management as the secured party were filed with the Cumberland County registry of deeds and with the secretary of state for Maine. The $75,000 check received by Cushman on execution of the note and mortgages was drawn by Bakers Management, which had earlier been provided with the necessary funds to cover it by Seaboard Milling.

Bakers Management was described by Harry Bresky as "a corporation formed which Seaboard used . . . for financing bakers." It is a paper corporation, all of whose stock is owned by Bresky Associates, a partnership consisting of Harry and Otto Bresky and their sister. Its only office is the Boston office of the law firm which is counsel for Seaboard Milling and its only officers are Charles Goldman and Julius Shack, members of that law firm. Since it is used, as Harry Bresky described it, only as "a pass-through" or "a vehicle to loan money," it has no income, no profit, and no loss.

Thus, ostensibly, Cushman received a new advance of $75,000 from Bakers Management, to whom it was not previously indebted, in exchange for a note in that amount secured by mortgages on its Portland properties. In fact it did not. At the March 6, 1968, closing, Carolan also gave Seaboard Milling's counsel Cushman's check for the $73,951.67 in antecedent debt owing to Seaboard Milling for flour shipped to Cushman in January, 1968, and earlier. What this paper-shuffling concealed was that the mortgages were held by Bakers Management to secure a new advance of only $1,048.33 by Seaboard Milling and $73,951.67 in antecedent indebtedness owed to Seaboard Milling.

On August 13, 1968, more than five months after the March 6 closing, Cushman Baking Company and a related company, Cushman Bakery, filed separate petitions in the federal District

Court for the District of Maine, later consolidated, for an arrangement under Chapter XI of the Bankruptcy Act (11 U.S.C. § 301 *et seq.*). In the four months preceding the filing of the petitions, Cushman paid Bakers Management three monthly installments on the note, aggregating $6,999, which Bakers Management immediately remitted to Seaboard Allied.[1] Within the same four month period Cushman also made payments of $101,941.02 to Seaboard Milling for flour shipped on 30 day credit. The Bankruptcy Judge found that the two Cushman companies were separately and collectively insolvent during the entire four month period prior to the filing of the petitions (Appendix C, *infra* at p. 71, 73), and the District Court held this finding was "amply supported by the evidence" (Appendix B, *infra* at p. 46). The Bankruptcy Judge also found (Appendix C, *infra* at p. 88), and the District Court did not review this finding, that Seaboard Milling had reasonable cause to believe Cushman insolvent when it received the payments totaling $108,940.02 within the four month period.

No plan of arrangement having been proposed in the consolidated Chapter XI proceeding, the Bankruptcy Judge adjudicated the Cushman companies bankrupt on June 2, 1969, and appointed petitioner trustee. Thereafter, on September 29, 1969, Bakers Management filed a proof of secured claim for $65,561.51 on the Cushman note and Seaboard Milling filed a proof of secured claim for $42,756.99 for flour shipped to Cushman.

On November 16, 1970, the petitioner, as trustee, objected to the allowance of either claim as a secured claim on the ground, *inter alia*, that the mortgages to Seaboard Milling were void as fraudulent conveyances. At a hearing on these objections on November 19, 1970, Seaboard Milling conceded that its claim for flour shipments was unsecured. At the same hearing, counsel for Seaboard Milling, who closed the loan transaction with Cushman and who was an officer of Bakers Management, was interrogated by the Bankruptcy Judge:

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[1] An earlier installment payment by Cushman on April 1, 1968, more than four months before bankruptcy, was made directly to Seaboard Milling.

"Q. Is it true that Seaboard Allied and Bakers Management are related?

"A. There are no common officers, no common stockholders. The money, I can say from my own knowledge, did not come from Seaboard Allied."

Harry Bresky later testified that the money to cover Bakers Management's check for $75,000 to Cushman was supplied by a check for $75,000 to Bakers Management from Seaboard Flour Corporation, which owns a majority of the stock of Seaboard Milling, but that the flour company was later reimbursed by Seaboard Milling.

On August 18, 1971, after discovery proceedings, the petitioner-trustee amended his objection to the proof of secured claim of Bakers Management and also filed an objection to the allowance of the unsecured claim of Seaboard Milling pursuant to § 57g of the Bankruptcy Act[2] unless all voidable preference received by it were surrendered. Seaboard Milling moved to dismiss this objection on the ground that it was barred by the two year statute of limitations contained in § 11e of the Bankruptcy Act.[3] On January 7, 1972, the petitioner-trustee filed an objection to the allowance of the claim of Bakers Management pursuant to § 57g of the Act unless all voidable preferences were surrendered.

After further hearing, the Bankruptcy Judge filed an opinion and order (Appendix C, *infra* at p. 61, 92) holding that the mortgages of Bakers Management were invalid both because not properly perfected against levying creditors under Maine law

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[2] "The claims of creditors who have received or acquired preferences . . . voidable under this Act, shall not be allowed unless such creditors shall surrender such preferences . . ." (11 U.S.C. § 93g).

[3] "A receiver or trustee may, within two years subsequent to the date of adjudication . . . institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy . . ." (11 U.S.C. § 29e).

and hence voidable by the bankruptcy trustee under § 70c of the Bankruptcy Act,[4] and because they constituted fraudulent conveyances voidable by the trustee under § 67d(2)(d) of the Act[5] and invalid under the common law of Maine and hence voidable by the trustee under § 70e of the Act,[6] so that Bakers Management's claim was unsecured. He also held that the two year limitation of § 11e of the Act was inapplicable to objections to the allowance of claims based on § 57g and that the objections were not barred by laches and ordered that the $65,561.57 claim of Bakers Management and the $42,756.99 claim of Seaboard Milling be disallowed unless voidable preferences in the amount of $108,940.02 were surrendered (Appendix C, *infra* at p. 85, 92).

On appeal the District Court by opinion and order (Appendix B, *infra* at p. 43, 59), held that the mortgages of Bakers Management were properly perfected against levying creditors under Maine law, that they did not constitute fraudulent conveyances under § 67d(2)(d) of the Bankruptcy Act or the common law of Maine, and that the two year statute of limitations in § 11e of the Act was applicable to bar objections to the allowance of claims pursuant to § 57g.

On further appeal the Court of Appeals for the First Circuit by opinion and order (Appendix A, *infra* at p. 17, 41) affirmed the

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[4] ". . . The trustee shall have as of the date of bankruptcy the rights and powers of . . . a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings upon all property . . . upon which a creditor of the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists . . ." (11 U.S.C. § 110c).

[5] Page 3, *supra*.

[6] "A transfer made or suffered . . . by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor having a claim provable under this Act, shall be null and void as against the trustee of such debtor" (11 U.S.C. § 110e).

decision of the District Court that the mortgages of Bakers Management were properly perfected under the law of Maine and did not constitute fraudulent conveyances under either § 67d (2)(d) of the Bankruptcy Act or the common law of Maine, so that Bakers Management's claim was validly secured. But it reversed the District Court's ruling that the two year limitation period of § 11e would bar an objection to the allowance of Seaboard Milling's unsecured claim pursuant to § 57g and remanded that part of the case to the District Court for consideration of two matters on which that court had not previously ruled—the correctness of the Bankruptcy Judge's rulings that the trustee's objection to Seaboard Milling's claim was not barred by laches and that Seaboard Milling had received voidable preferences.

Reasons for Granting the Writ.

In its decision of the first question presented, the court below, while conceding that the purpose of using Bakers Management as Seaboard Milling's nominee "was so that other bakers would not know that Seaboard was financing one of their competitors and other flour suppliers [creditors of Cushman] would not know that Seaboard had loaned [sic] money to Cushman," concluded that both purposes were "legitimate business purposes" (Appendix A, *infra* at p. 33) and hence that the mortgages were not made with intent to hinder, delay, or defraud other creditors of Cushman within the meaning of § 67d(2)(d) of the Bankruptcy Act. Since, to the extent of $73,951.67, what that court characterizes as a $75,000 secured "loan" was the securing of antecedent indebtedness (see p. 20, *supra*), the decision below amounts to a holding that the concealment of a preferential transfer is a legitimate business purpose and does not convert the transfer into a fraudulent conveyance. That decision, which reduces the standard for intent to hinder, delay, or defraud under § 67d(2)(d) at least to the levels of the morals of the marketplace, is contrary to the policy of the Bankruptcy Act as reflected in prior decisions of this Court and presents an

important question of first impression under the Bankruptcy Act which should be settled by this Court.

Section 67d(2)(d) of the Bankruptcy Act defines as a fraudulent conveyance one made with actual intent to hinder, delay, or defraud creditors even though made for a fair consideration.[7] Under § 67d(6) such a conveyance is voidable by the bankruptcy trustee except as against a bona fide purchaser or lienor for present, fair, equivalent value.

Since antecedent debt constitutes fair consideration under § 67d(1)(e) (11 U.S.C. § 107d(1)(e)), as it did under the common law of fraudulent conveyance, 1 G. Glenn, *Fraudulent Conveyances and Preferences* § 289 (rev. ed. 1940), preferential payment of, or the giving of security for, an antecedent debt by an insolvent debtor does not, without more, constitute a fraudulent conveyance even though the debtor intends to give and the creditor intends to receive preferential treatment over other creditors. *Van Iderstein* v. *National Discount Company*, 227 U.S. 575, 582; 33 S. Ct. 343; 57 L. Ed. 652 (1913).[8] *Davis* v. *Schwartz*, 155 U.S. 631, 637-638; 15 S. Ct. 237; 39 L. Ed. 289 (1895).[9]

But, as with every other transfer made for fair consideration, additional evidence of the debtor's fraudulent intent, known to the transferee, may establish that the transfer was fraudulent as well as preferential. *Coder* v. *Arts*, 213 U.S. 223, 241, 244; 29 S. Ct. 436; 53 L. Ed. 772 (1909).[10] "It has been the accepted

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[7] Section 67d(2)(a), (b) and (c) (11 U.S.C. § 107d(2)(a), (b) and (c)) define other fraudulent conveyances, a common element of which is a lack of fair consideration, under which no intent to hinder, delay, or defraud is necessary.

[8] Decided under former § 67e of the Bankruptcy Act (30 Stat. 564) authorizing the trustee to avoid transfers made by the debtor "with the intent and purpose on his part to hinder, delay, or defraud his creditors," which was replaced in 1938 with present § 67d (52 Stat. 875).

[9] Decided under common law doctrine.

[10] Decided under former § 67e. See n.8, *supra*.

law ever since *Twyne's Case*, 3 Coke 80 [76 Eng. Rep. 661 (1571)], that good faith as well as a valuable consideration is necessary to support a conveyance against creditors." *Davis* v. *Schwartz*, *supra*, 155 U.S. at 638. Since *Twyne's Case*, also, secrecy and concealment have been recognized as "badges of fraud." See 4 Collier, *Bankruptcy* ¶67.37[3], p. 539 (14th ed.).[11]

This "badge of fraud" was held sufficient to convert a preference into a fraudulent conveyance in *Blennerhassett* v. *Sherman*, 105 U.S. 100; 26 L. Ed. 1080 (1881), a case arising under the Bankruptcy Act of 1867 at a time when that Act's preference section (§ 35, 14 Stat. 534) had been amended to apply in involuntary cases only to transfers made within two months of bankruptcy (§ 10, 18 Stat. 180). The debtor had given a mortgage to secured antecedent debt which the mortgagee, with knowledge of the debtor's insolvency, withheld from record for two months and one day and then recorded more than a month before an involuntary bankruptcy petition was filed, meanwhile misrepresenting to others that the debtor was solvent. The mortgage was held to be voidable as a fraudulent conveyance under other provisions of § 35 of the 1867 Act:

> "We . . . declare that a mortgage executed by an insolvent debtor, with intent to give a preference to his creditor, who has reasonable cause to believe him to be insolvent, and knows it to be made in fraud of the provisions of the Bankrupt Act, and who, for the purpose of evading the provisions of that act, actively conceals and withholds it from record for two months, is void under the Bankrupt Act, notwithstanding the fact that it was executed more than two months before the filing of a petition in bankruptcy by or against the mortgagor.

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[11] The court below relied on *In re Locust Bldg. Co., Inc.*, 299 F.756 (2d Cir. 1924), cert. den. 265 U.S. 590; 44 S. Ct. 635; 68 L.Ed. 1194 (1924), for the proposition that "the bankrupt's use of a nominee as mortgagee has been held not to be even a badge of fraud" (Appendix A, *infra* at p. 35). But in that case use of a nominee by the bankrupt did not conceal a preferential transfer and the mortgages under attack as fraudulent conveyances had been assigned to a bona fide purchaser for value prior to bankruptcy.

"If the mortgage had been executed within the period of two months next before the filing of the petition in bankruptcy, it would have been void under the letter of the Bankrupt Act. Where all the other circumstances necessary to render it void concur, the device of concealing it until two months have elapsed cannot save it. It is, notwithstanding the lapse of time, a fraud on the policy and objects of the bankrupt law, and is void as against its spirit." 105 U.S. at 121-122.

Alternatively, this Court in *Blennerhassett* also held that the mortgage was "void at common law . . . without regard to the provisions of the Bankrupt Act":

"[W]here a mortgagee, knowing that his mortgagor is insolvent, for the purpose of giving him a fictitious credit actively conceals the mortgage which covers his entire estate and withholds it from the record, and while so concealing it represents the mortgagor as having a large estate and unlimited credit, and by these means others are induced to give him credit, and he fails and is unable to pay the debts thus contracted, the mortgage will be declared fraudulent and void at common law, whether the motive of the mortgagee be gain to himself or advantage to his mortgagor." 105 U.S. at 117.

The court below distinguished *Blennerhassett* as a case where the mortgagor was given a false credit standing by complete withholding of the mortgage from record, whereas in this case the mortgages were recorded and filed although the fact that they were given to secure antecedent debt was concealed (Appendix A, *infra* at p. 34). In so doing, the court focused solely on the alternative ground for decision in *Blennerhassett* and ignored the decision under § 35 of the 1867 Act.

True, § 35 of the 1867 Act (14 Stat. 534) spoke of transfers made to "defeat the object" or to "evade the provisions" of that Act. But that was not true of former § 67e of the present Act (30 Stat. 564), which § 67d(2)(d) has now replaced, and which spoke only of transfers made by a debtor "with the intent and purpose on his part to hinder, delay, or defraud his creditors." Yet in *Dean* v. *Davis*, 242 U.S. 438; 37 S. Ct. 130; 61 L. Ed. 419 (1917), this Court held voidable under § 67e a properly recorded mortgage taken to secure a contemporaneous advance where the insolvent debtor intended to and did use the proceeds of the mortgage loan to prefer another creditor and all of these facts were known to the mortgagee. Although an involuntary petition in bankruptcy was filed within four months thereafter, this Court concluded, without regard to whether the preference was voidable under § 60, that the mortgage was voidable under § 67e because "A transfer, the intent (or obviously necessary effect) of which is to deprive creditors of the benefits sought to be secured by the Bankruptcy Act, 'hinders, delays or defrauds creditors' within the meaning of § 67e." 242 U.S. at 444.

Obviously, the "benefits to be secured by the Bankruptcy Act," which the Court in *Dean* v. *Davis* found that the debtor and the mortgagee intended to deprive creditors of, consisted of the ability of the trustee to avoid preferential transfers made within four months of bankruptcy under § 60, although the bankruptcy petition was filed in that case in ample time to allow the trustee to pursue the preference in the hands of the preferred creditor. In this case, the entire form of the loan transaction and of the documents recorded and filed was even more obviously designed to deprive other creditors of the protection of § 60 and even more obviously had that effect. Thereby transfers to secure antecedent debt were concealed and made to appear as transfers to secure a fresh loan and the bankruptcy petitions were not filed until more than four months thereafter so that the transfers were immune from the trustee's attack under § 60. The fact and the effect of that concealment and deception provide the additional evidence of fraudulent intent, known to the mortgagee, which will convert those preferential transfers into fraudulent conveyances.

Indeed, what was done here is now even more clearly contrary to the preference policy of the Bankruptcy Act than it was at the time of the *Blennerhassett* and *Dean* v. *Davis* decisions, Section 60a(2) of the Act (p. 3, *supra*) is designed to compel disclosure of secret preferences before the running of the four

month period within which they can be treated by other creditors as acts of bankruptcy supporting an involuntary petition under § 3a(2) (11 U.S.C. § 21a(2)) and avoided by the trustee under § 60. This § 60a(2) does by providing that a transfer is not "deemed made," so that the four month period does not begin to run, until a transfer of realty is perfected against bona fide purchasers and a transfer of personalty is perfected against levying creditors under nonbankruptcy (usually state) law.[12] As this Court said in applying an earlier version of § 60a(2), "for thirty-five years Congress has consistently reached out to strike down secret transfers, and the courts have with equal consistency found its efforts faulty or insufficient to that end." *Corn Exchange National Bank & Trust Co.* v. *Klauder,* 318 U.S. 434, 438; 63 S. Ct. 679; 87 L. Ed. 884 (1943) (footnote omitted). If, as the court below held, a transfer to secure antecedent debt which is filed and recorded in a form indicating that it is a transfer to secure a new advance is nonetheless perfected against bona fide purchasers and levying creditors under state law, and if it is not a fraudulent conveyance under § 67d (2)(d) of the Bankruptcy Act, a new device has been fashioned to evade the policy of § 60a(2) to expose secret preferences.

Both Harry and Otto Bresky know that Cushman had other creditors and that the form of the loan transaction made it appear that a new advance of $75,000 had been made. Otto Bresky originally testified that the transaction was cast as it was because Cushman didn't want the trade to know that the loan was made by Seaboard Milling but, at a later hearing, "after talking to my brother," conformed his testimony to Harry's by explaining that the purpose was to conceal from other baker customers of Seaboard Milling the fact that it was loaning money to Cushman.

In any event, "even in cases where the direct issue of fraud is involved, knowledge may be imputed where one willfully closes

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[12] Section 3b (11 U.S.C. § 21b) also provides that the four month period of § 3a with respect to preferential transfers "shall not expire until four months after the date when the transfer became perfected as prescribed in subdivision a of section 60 of this Act."

his eyes to information within his reach." *Wecker* v. *National Enameling and Stamping Company,* 204 U.S. 176, 185; 27 S. Ct. 184; 51 L. Ed. 430 (1907). In fraudulent conveyance cases, this principle is held to mean that both the debtor and the transferee must be held to intend the necessary consequences of their acts. *Dean* v. *Davis,* 242 U.S. 438, 445; 37 S. Ct. 130; 61 L. Ed. 419 (1917); *Western Tie and Timber Company* v. *Brown,* 196 U.S. 502, 508-509; 25 S. Ct. 339; 49 L. Ed. 571 (1905); *Wilson* v. *City Bank,* 17 Wall. 473, 486; 21 L. Ed. 723 (1873). The principle is particularly applicable here where both Cushman and Seaboard Allied acted with advice of counsel in the loan transaction.

The petitioner does not suggest that the second question presented by this case, involving as it does only a question of Maine law as to the perfection of security interests in real and personal property, constitutes a basis for granting certiorari although it is a question of first impression in Maine and elsewhere. But, if certiorari should be granted because of the first question presented, the petitioner seeks to preserve the second question in the event that the Court wishes to have it briefed and argued.

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the First Circuit.

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Appendix A.

United States Court of Appeals
For the First Circuit

No. 75-1104

In re CUSHMAN BAKERY and
CUSHMAN BAKING COMPANY,

JACOB AGGER,
TRUSTEE, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE
(HON. EDWARD T. GIGNOUX, *U.S. District Judge*)

Before COFFIN, *Chief Judge*,
MCENTEE, *Circuit Judge*, and THOMSEN*,
Senior District Judge

Vern Countryman, with whom *Arthur T. Wasserman* and *Charles W. Smith* were on brief, for appellant.

William W. Willard, with whom *Alan B. Atkins*, *Bernstein, Shur, Sawyer and Nelson*, *Julius L. Shack*, and *Slater, Goldman, Gillerman, Shack and Tutun* were on brief, for appellees.

November 25, 1975

COFFIN, *Chief Judge*. The trustee in bankruptcy for Cushman Baking Company and Cushman Bakery (hereinafter sometimes collectively referred to as "Cushman"), appeals from a final judgment of the District Court for the District of Maine, reversing the order of a bankruptcy judge. The district court held that the bankruptcy judge had erred in (1) declaring invalid a secured claim in the amount of $65,561.51 filed by Bakers Management Corporation (hereinafter referred to as "Bakers") on the ground that the

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*Of the District of Maryland, sitting by designation

"real and personal property transfers were not properly perfected and in any event were fraudulent" and (2) further disallowing, pursuant to § 57g of the Bankruptcy Act, 11 U.S.C. § 93(g), that claim and an unsecured claim of $42,756.99 filed by Seaboard Allied Milling Corporation (hereinafter referred to as "Seaboard"), unless voidable preferences totalling $108,940.02 were surrendered.[1]

I. *Factual and Procedural History*

Cushman Baking Company and Cushman Bakery were interrelated corporations which operated bakeries in Portland, Maine and Lynn, Massachusetts for many years. Cushman Baking Company operated the Portland plant, and Cushman Bakery operated the Lynn plant until it closed in 1967. For some 30 to 40 years, Seaboard had supplied flour to Cushman on an open account basis, payable 30 days after delivery. In the latter part of 1967, Cushman's account with Seaboard was running substantially in arrears, and it owed Seaboard $31,624.65 on its last five flour shipments.

Following several meetings between officers of Cushman and Seaboard and after Seaboard's officer had examined Cushman's finances, Seaboard, in January, 1968, agreed to lend Cushman $75,000 for working capital, to be secured by second mortgages on real and personal property located in Portland and by an assignment of a second mortgage on the Lynn plant, which Cushman Baking Company held to secure an inter-company indebtedness of $100,000. Seaboard also agreed to extend $25,000 in credit for flour shipments payable 30 days after delivery.

Although Seaboard was to supply the money for the loan,

[1] Parts I and II of this opinion — the statement of facts and the discussion of the validity of Baker's secured claim — substantially reflect the thoughts and wording of the fine unpublished opinion of the district court. In many instances, we saw no reason to attempt to express its ideas differently and, accordingly, adopted its phraseology. In other instances, we made slight changes in the language and emphasis of the district court in order to answer the arguments appellant pressed on appeal.

it was to be granted in the name of Bakers as Seaboard's nominee. Bakers is an affiliated corporation which had customarily acted as Seaboard's nominee in loan transactions. Bakers is controlled by the individuals who control ~~Cushman~~ Seaboard and is a "paper corporation" with no assets, income, or profits. As part of the loan transaction, it was also agreed that Cushman would purchase from Seaboard a minimum of 50,000 cwt of flour annually (nearly double the average quantity purchased by Cushman from Seaboard over the last three years), so long as any part of the $75,000 loan remained unpaid. This part of the agreement was incorporated into a Flour Purchase Agreement signed on February 16, 1968. It was contemplated that Seaboard would be secured for future flour shipments by an assignment from Bakers of the mortgages given as security for the $75,000 loan.

On March 4, 1968, before the loan transaction was closed, Seaboard stopped shipments to Cushman because Cushman was too far behind in its payments on account. The loan was closed on March 6, 1968. The documents reflect that on February 12, 1968 Union Mutual Life Company (hereinafter referred to as "Union Mutual"), the holder of the first mortgage on Cushman's Portland realty, consented to Cushman's giving a second mortgage on its Portland real estate. At the closing, Bakers' check for $75,000 was delivered to Cushman, and Cushman delivered its promisory note dated February 16, 1968 for $75,000 to Bakers. This note was secured by three documents: (1) a second mortgage on Cushman's real property in Portland dated February 16, 1968; (2) a second mortgage on Cushman's personal property in Portland dated February 12, 1968; and (3) an assignment of the second mortgage on Cushman's Lynn property. The second mortgage on the Portland real estate was recorded in the Cumberland County, Maine, Registry of Deeds on

March 6, 1968. Two financing statements to perfect the second security interest in the Portland personal property were filed, one in the Cumberland County Registry of Deeds and the other in the office of the Secretary of State of Maine, both on March 8, 1968. The real estate mortgage identifies Cushman Baking Company as the mortgagor and Bakers as the mortgagee. The financing statements identify Cushman Baking Company as the debtor and Bakers as the secured party. The assignment of the security instruments from Bakers to Seaboard to secure future flour shipments was never executed, and, because of this failure, Seaboard conceded that its claim for the flour shipped to Cushman after March 6, 1968 is unsecured. Upon receiving Bakers' check for $75,000 at the March 6 closing, Cushman gave Seaboard a check for $73,961.67, representing Cushman's then current indebtedness for flour shipments plus the price of the two February shipments which had been stopped in transit and which were then released by Seaboard.

Subsequent to the loan closing, Seaboard continued to ship Cushman between $25,000 and $30,000 worth of flour monthly. During the four months preceding the filing of Chapter XI proceedings on August 13, 1968, Cushman paid Seaboard $101,941.02 for shipments totalling $144,698.01. As a result, as of the date of the Chapter XI proceedings, Cushman owed Seaboard $42,756.99. During this four month period, Cushman paid three monthly installments due on the $75,000 note, each in the amount of $2,333. Accordingly, as of the date of the Chapter XI proceedings, Cushman owed Bakers $65,561.51 for principal and interest on the note. The bankruptcy court found, and the district court accepted this finding, that Cushman Baking Company and Cushman Bakery were individually and collectively insolvent, within the meaning of § 60(a) of the Bankruptcy Act, 11 U.S.C. § 96(a), at all times during the four month period prior to

the initiation of the Chapter XI proceedings on August 13, 1968.

On June 2, 1969, after it became apparent that a plan could not be proposed under Chapter XI of the Bankruptcy Act, 11 U.S.C. § 701 *et seq.*, both Cushman Baking Company and Cushman Bakery were adjudicated bankrupt pursuant to § 376(2) of the Act, 11 U.S.C. § 776(2). Thereafter, on September 29, 1969, Bakers filed a proof of claim and a petition to establish a lien in the amount of $65,561.51, based upon the $75,000 note and the real and personal property second mortgages given by Cushman Baking Company to Bakers on March 6, 1968. Also on September 29, 1969, Seaboard filed a proof of claim and a petition to establish a lien in the amount of $42,756.99, based upon the February 16, 1968 Flour Purchase Agreement and an assignment from Bakers to Seaboard of the Cushman Baking Company note and second mortgages. As previously indicated, however, Seaboard eventually conceded that its claim was unsecured since the contemplated assignment had not been made.

On November 16, 1970, the trustee in bankruptcy filed formal objections to the establishment of Bakers' and Seaboard's liens, alleging that the security transactions were not properly authorized by Cushman Baking Company's directors and, further, that, as "secret liens", they constituted a fraud on creditors. On August 18, 1971, more than two years after the date on which Cushman was adjudicated bankrupt, the trustee amended his objections to Bakers' secured claim and, for the first time, filed an objection to Seaboard's unsecured claim on the ground that it should be disallowed pursuant to § 57g of the Bankruptcy Act, unless Seaboard surrendered voidable preferences of $101,941.02 — the amount Seaboard received as payments on the flour shipments. On September 24, 1971, Seaboard moved to dismiss this objection on the ground that it was barred by the

two year statute of limitations of § 11e of the Act, 11 U.S.C. § 29(e). On January 7, 1972, the trustee filed an identical objection to Bakers' claims, asserting that it should be disallowed unless voidable preferences of $6,999 — the amount of the three payments Bakers received on the $75,000 note — were surrendered.

After a hearing, the bankruptcy judge held that Bakers' secured claim of $65,561.51 was invalid because the real and personal property security interests were not properly perfected and, further, were fraudulent transfers under §67d(2)(d) of the Bankruptcy Act, 11 U.S.C. §107(d)(2)(d). He further held that the trustee's objections to Bakers' claim and to Seaboard's unsecured claim of $42,756.99 were not barred by the statute of limitations of § 11e, and disallowed both claims pursuant to § 57g unless voidable preferences in the amount of $108,940.02 (the $101,941.02 flour payments plus the $6,999 payment on the $75,000 note) were surrendered.

Bakers and Seaboard appealed the bankruptcy judge's order to the district court and the district court reversed and remanded, holding (1) that Bakers' secured claim of $65,561.51 had been properly perfected under Maine law, (2) that the secured transaction which formed the basis for Bakers' secured claim were not fraudulent under § 67d(2)(d) of the Act, and (3) that the trustee's § 57g objection to the allowance of Seaboard's unsecured claim was barred by the two year statute of limitations of § 11e of the Act. We affirm that portion of the district court decision that held that Bakers' secured claim was properly perfected and not fraudulent under § 67d(2)(d). However, we reverse that portion of the district court's opinion holding that § 11e barred the bankruptcy judge from considering the trustee's objections to the allowance of Seaboard's claim, and we remand for proceedings consistent with this opinion.

II. *The Validity of Bakers' Secured Claim*

Perfection of Security Interests. Appellant contends that Bakers' security interests were not properly perfected under Maine law and hence were voidable by the trustee in bankruptcy under § 70(c) of the Bankruptcy Act, 11 U.S.C. § 110(c). Specifically, appellant maintains that the financing statement Bakers filed to perfect its interests were ineffective under Maine law.

Maine's statutory law requires that real and personal property security transactions be recorded in order to be effective against third parties. It is clear that Bakers fully complied with the express provisions of the relevant recording statutes and disclosed all the information that the Maine statutes governing the recording of security interests in real and personal property explicitly require. To perfect a security interest in realty, Maine law requires only that a properly executed and acknowledged real estate mortgage be recorded in the appropriate registry of deeds and be cross- indexed under the names of the mortgagor and mortgagee. 33 M.R.S.A. §§ 151, 201, 203, and 651. Under the Maine Uniform Commercial Code, a security interest in personalty is perfected if the secured creditor files a financing statement that discloses the names and addresses of the secured party and the debtor, and indicates the type of collateral. 11 M.R.S.A. §§ 9-301, 9-302, 9-401, and 9-402. A properly executed and authenticated real estate mortgage was admittedly filed by Bakers in the Cumberland County Registry of Deeds, disclosing Bakers as the mortgagee and Cushman as the mortgagor; and financing statements that were facially sufficient under the Uniform Commercial Code were filed in the Cumberland County Registry of Deeds and the office of the Secretary of State of Maine, listing Bakers as the secured party and Cushman as the debtor.

Appellant does not dispute Bakers' full compliance with

the literal command of the Maine recording statutes. Rather, appellant argues that the financing statements Bakers filed should be deemed ineffective because they failed to disclose Seaboard's interest and, hence, concealed the "true nature" of the transaction. If the financing statement had disclosed Seaboard's interest, appellant maintains it would have given Cushman's other creditors, who presumably were well aware of Cushman's financial situation, notice that possibly the transaction had secured Cushman's antecedent debt to Seaboard. Cushman's other creditors then would have investigated Cushman's financial situation, discovered its insolvency, filed a petition to have Cushman adjudged bankrupt within four months and thereby ensured that the secured transfer would have been a preference within the meaning of § 60a of the Bankruptcy Act, 11 U.S.C. § 96(a).[2] Appellant submits that when a security interest is intentionally perfected in a manner that may result in concealing a preference from unsecured creditors it should be held not to be properly perfected under the Maine recording statutes.[3]

The short answer to appellant's argument is that under Maine's system of notice filing, a financing statement is not intended to enable other creditors to learn the "true nature" of the secured transaction. The provisions of the Maine statutes do not support appellant's premise that the system

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[2] At oral argument, appellee conceded that the secured transaction would have been a preference under § 60a of the Act if the bankruptcy petition had been filed within four months of the transaction.

[3] Throughout its brief, appellant characterizes the use of Bakers as Seaboard's nominee as fraudulent. Whether it is fraudulent under § 67d(2)(d) of the Bankruptcy Act will be addressed later in this opinion. In considering appellant's argument under the Uniform Commercial Code, we question whether a secured party's fraudulent intent could vitiate its status as the holder of a perfected security interest. It is true that 11 M.R.S.A. § 1-203 provides that every duty within this Act imposes an obligation of good faith in its performance, but this section, on its face, has no application to the filing of a financing statement since the Code does not impose a duty to file such statements. Assuming *arguendo* that an absence of good faith will invalidate an otherwise sufficient financing statement, we do not believe that appellant has demonstrated such a lack of good faith here.

of notice filing is designed to do more than apprise creditors that the secured party may have a security interest in the collateral described in the financing statement. As the Official Comment to § 9-402(1) of the Code states: "The notice itself indicates merely that the secured party who has filed *may* have a security interest in the *collateral described.* Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs. Section 9-208[4] provides a statutory procedure under which the secured party, at the debtor's request, may be required to make disclosure." 11 M.R.S.A. § 9-402, Uniform Commercial Code Comment 2 [emphasis supplied]. The case law makes it abundantly clear that a financing statement is intended merely "to put a searcher on notice that an underlying security agreement may be outstanding. A properly filed financing statement would thus serve its intended purpose if a subsequent party would have been put on notice of an outstanding security agreement." *Bramble Transportation, Inc.* v. *Sam Senter Sales, Inc.*, 294 A.2d 97, 103 (Del. 1971). *See also In re King-Porter Co.*, 446 F.2d 722, 729 (5th Cir. 1971); *Wolf* v. *Aero Factors Corp.*, 126 F. Supp. 872, 876 (S.D. N.Y. 1954), *aff'd per curiam*, 221 F.2d 291 (2d Cir. 1955); *John Deere Co.* v. *William C, Pahl Construction Co.*, 300 N.Y.S. 2d 701, 703 (1969); *National Cash Register Co.* v.

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[4] Section 9-208, 11 M.R.S.A. § 9-208, provides in pertinent parts:

"(1) A debtor may sign a statement indicating what he believes to be the aggregate amount of unpaid indebtedness as of a specified date and may send it to the secured party with a request that the statement be approved or corrected and returned to the debtor . . . .

(2) The secured party must comply with such a request within 2 weeks after receipt by sending a written correction or approval . . . . If the secured party without reasonable excuse fails to comply, he is liable for any loss caused to the debtor thereby, and if the debtor has properly included in his request a good faith statement of the obligation or a list of the collateral or both, the secured party may claim a security interest only as shown in the statement against persons misled by his failure to comply. If he no longer has an interest in the obligation or collateral at the time the request is received, he must disclose the name and address of any successor in interest known to him and he is liable for any loss caused to the debtor as a result of failure to disclose."

Firestone and Co., 191 N.E.2d 471, 474 (Mass. 1963).

Appellant contends that in cases like the one at bar notice does not provide the debtor with a sufficient opportunity to protect its interest. Appellant notes that § 9-208 only requires disclosure, on request of the debtor, of the amount of the indebtedness and identity of the specific collateral. Because § 9-208 does not require that the secured party disclose information about the nature of the obligation secured, interested parties must rely on voluntary responses to inquiries directed to the debtor or the secured party in order to obtain this information. Appellant's argument proves too much. Rather than support his contention that financing statements that fail to disclose this information should be deemed ineffective, the argument strongly suggests that the sole purpose of the filing system is to provide a mechanism by which other creditors may learn the extent to which specific collateral is encumbered and, hence, that the filing system was not designed to permit other creditors to learn the uses to which the credit had been put or the nature of the obligation secured.[5]

Although appellant does not argue that the use of a nominee per se invalidated the financing statement, we note that it is clear that the recording of the real estate mortgages and financing statements was entirely proper despite the fact

[5] We reject any suggestion that creditors who suspect that a recorded secured transaction is a disguised preference are at the mercy of the debtor or the secured party. If the debtor were to refuse to respond to a creditor's inquiries, it would put the creditor on notice that his interests may have been prejudiced and, quite possibly, would lend considerable support to a trustee's later argument that the transfer was fraudulent within the meaning of § 67d(2)(d) of the Bankruptcy Act. *See* 4 Collier on Bankruptcy ¶ 67.37[3].

Here, we note that no creditor made any inquiries of either Cushman or Bakers, and there is no suggestion by appellant that either party would not have disclosed the nature of the transaction if specific inquiries had been made. It is clear that the burden of inquiry is on the creditor and that the secured party need not, in order to prove perfection of its security interest, demonstrate that it was always willing to disclose the "true nature" of the transaction to inquiring creditors. *See* 11 M.R.S.A. § 9-402, Uniform Commercial Code Comment 2.

that Bakers, as Seaboard's nominee, rather than Seaboard, as the principal creditor, was named as the mortgagee and secured party. The use of a nominee in real estate transactions, and as mortgagee in a recorded mortgage, has long been sanctioned as a legitimate practice. *Eastern Milling Co.* v. *Flanagan*, 130 A.2d 925 (Me. 1957); *Amherst Factors* v. *Kochenburger*, 173 N.Y.S.2d 570, 573 (1958); *Richardson* v. *Stewart*, 247 N.W. 273, 274 (Iowa 1933); *First National Bank of Bridgeport* v. *National Grain Corp.*, 131 A. 404, 406 (Conn. 1925); *Newton Savings Bank* v. *Howerton*, 145 N.W. 292, 293 (Iowa 1914). The use of a nominee is likewise legitimate under the Uniform Commercial Code. As noted in *Industrial Packaging Products Co.* v. *Fort Pitt Packaging International, Inc.*, 161 A.2d 19, 21 (Pa. 1960):

> "The Uniform Commercial Code does not require that the secured party as listed in such statement be a principal creditor and not an agent. . . . The purpose of filing this financing statement is to give notice to potention future creditors of the debtor or purchasers of the collateral. It makes no difference as far as such notice is concerned whether the secured party listed in the filing statement is a principal or an agent, and no provision in the Uniform Commercial Code draws such a distinction."

See also In re Fried Furniture Corp., 293 F. Supp. 92 (E.D. N.Y. 1968).[6]

Appellant's argument acquires most of its force from his characterization of the financing statement as "concealing a *preference*". However, it is clear, and appellant does not contend otherwise, that the Bankruptcy Act does not require

[6] That the Uniform Commercial Code does not require disclosure of the name of the real party in interest in a secured transaction is further evident from the Code's treatment of assignments of security interests. Under § 9-405, 11 M.R.S.A. § 9-405, a financing statement need not disclose that an assignment has been made and no filing of an assignment is necessary to continue the perfected status of a security interest.

that the state laws governing the sufficiency of financing statements conform with appellant's position. Whether a security interest has been perfected against the trustee in bankruptcy is exclusively a question of state law. The Bankruptcy Act operates to vest the trustee with the status of a hypothetical lien creditor, 11 U.S.C. §110(c), but in no way does it purport to require that financing statements disclose certain information. Section 60 of the Bankruptcy Act, which defines voidable preferences, only affects transfers which fall within its express terms. *See* 3 Collier on Bankruptcy ¶ 60.02[1].

Here we are satisfied that Bakers' security interest was properly perfected under Maine state law. Thus, we affirm this portion of the district court's decision.

Fraudulent Transfers. As an alternative ground for invalidating Bakers' secured claim, the trustee-appellant argues that the secured transactions were invalid as against him under §§ 70c and 70e of the Bankruptcy Act, 11 U.S.C. §§ 110(c), 110(e), because they were fraudulent under § 67d(2)(d) of the Bankruptcy Act, 11 U.S.C. § 107(d)-(2)(d),[7] and the statute of 13 Eliz. c. 5 (1570).[8] Under these statutes, a transfer for fair consideration is fraudulent if the transferor had an actual intent, not an intent presumed in law, "to hinder, delay, or defraud creditors".[9] The

[7] Section 67d(2)(d) of the Bankruptcy Act provides:

"Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition under this Act or by or against him is fraudulant . . . (d) as to then existing and future creditors, if made or incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors."

[8] This statute has been adopted as part of Maine's common law. It declares "utterly void" as against creditors, any conveyance made with intent to "delay, hinder, or defraud creditors". *Butler* v. *Moore*, 73 Me. 151, 154-55 (1882). At least as far as the case at bar is concerned, this statute and § 67d(2)(d) of the Bankruptcy Act have the same content.

[9] Clauses (a), (b), and (c) of § 67d(2) of the Act render fraudulent transfers made for less than fair consideration. Under these clauses, and under paragraphs (3) and (4) of § 67(d), fraudulent intent is predicated in law because of the circumstances in which the transfers are made. Under § 67d(2)(d) of the Act, fraudulent intent is not presumed in law. A transfer for fair consideration can only be made fraudulent upon proof of actual intent to hinder, delay, or defraud creditors. *See* 4 Collier, *supra*, ¶ 67.37[1]. Appellant concedes that Cushman received fair consideration here.

bankruptcy judge accepted appellant's argument and held that the transfer was made with the required intent. He stated that it was unnecessary to consider whether Cushman, the transferor had the required intent because Seaboard was in "a unique position to dominate or control the manner in which Cushman's property was disposed". Under such circumstances, the bankruptcy judge concluded, relying upon *Langan* v. *First Trust and Deposit Co.*, 58 N.E.2d 424 (N.Y. 1944) and 4 Collier on Bankruptcy ¶ 67.37[2],[10] that proof that Seaboard had the requisite intent would be sufficient to establish that the transfers were fraudulent.

The district court, however, held that the application of the *Langan* rule was inappropriate since Seaboard clearly did not have such domination or control over Cushman as to dispense with the necessity of proving that Cushman actually intended to hinder, delay or defraud its creditors. Since there was no evidence of any fraudulent intent on the part of Cushman and since the bankruptcy judge did not find such fraudulent intent, the district court reversed. Although not necessary to its holding, the district court went on to note that the record provided questionable support for the bankruptcy court's finding that Seaboard had actual intent to hinder, delay or defraud Cushman's creditors. Appellant challenges the district court's holding on those points. First, it contends that the bankruptcy court's application of the *Langan* rule was not reversible error. Second, appellant argues that, even if the *Langan* rule does not apply, the dis-

[10] Collier states the *Langan* rule as follows:

"Where the transferee or obligee is in a position to dominate or control the bankrupt's disposition of his property, however, his intent to hinder, delay, or defraud creditors would seem sufficient to render the transfer or obligation fraudulent within § 67d(2)(d) without respect to the purpose of the bankrupt." 4 Collier, *supra*, ¶ 67.37[2] at p. 533.

trict court erred in concluding that Cushman lacked the intent to delay, hinder, or defraud its creditors. According to appellant, the necessary and obvious consequences of the form in which the transaction was cast, filed, and recorded was to conceal from all other creditors that the transaction effected a preferential transfer to Seaboard and, hence, unlawfully to prejudice Cushman's creditors in the exercise of the rights conferred upon them by the Bankruptcy Act. Since both Seaboard and Cushman must be held to have intended the necessary and obvious consequences of their actions, the court must impute intent to defraud to both of them.[11]

We agree that the *Langan* rule has no applicability to this case. In *Langan*, a bank had taken over the total management of the bankrupt's affairs, and the court held that the bank's proven intent to hinder, delay, or defraud creditors dispensed with the necessity of proving that the bankrupt itself had such an intent when it made the transfer. *Langan* was a case in which the transferee was in a position to dominate or control the bankrupt's disposition of the property. 4 Collier, *supra*, at p. 533. Appellant maintains that there was sufficient evidence to support the bankruptcy judge's determination that there was sufficient domination of Cushman by Seaboard to invoke the *Langan* rule. In support of his contention that the evidence was sufficient, appellant points to the uncontradicted evidence that Cushman was "strapped for cash" prior to taking the security interest, that Seaboard had stopped shipments because of defaults by Cushman in payments immediately before the security

[11] The intent of Seaboard (and Bakers) is relevant as well. Under § 67d(6) of the Act, 11 U.S.C. § 107(d)(6), even if Cushman intended to defraud its creditors within the meaning of § 67d(2)(d), the transfer will not be invalid against the trustee unless Bakers fails to qualify as a "bona fide purchaser for a present fair equivalent value". Because we hold that Cushman did not act with fraudulent intentions, it is not necessary for us to consider whether Seaboard (and Bakers) qualify as bona fide purchasers for present equivalent value.

agreement was consummated and that the bargain was, on the whole, very favorable to Seaboard. These facts, however, do not establish that Seaboard dominated Cushman's disposition of its property within the meaning of the *Langan* doctrine. The district court was correct in holding that, as a matter of law, Seaboard did not have such domination or control over Cushman as to dispense with the necessity of proving that Cushman had an actual intent to defraud its creditors. The record shows that the loan transaction was the result of extended negotiations between the officers of independently controlled and nonaffiliated corporations, all of whom were knowledgeable and sophisticated businessmen. Cushman, concededly experiencing financial difficulties and presumably without many alternative sources of credit, needed credit and a reliable source of flour. Seaboard desired security for Cushman's outstanding indebtedness and the continuance of Cushman as a customer for its flour. The ultimate arrangement served the business interests of both parties. *See In re Southern Land Title Corp.*, 316 F. Supp. 1059, 1065-66 (E.D. La. 1970). The fact that the terms of the agreement were perhaps more favorable to Seaboard than to Cushman does not vitiate its quality as an arm's length transaction.

To establish that the transfers were fraudulent, therefore, it was necessary to demonstrate that Cushman had an actual intent to defraud, hinder or delay its creditors. The district court found that there was no evidence that Cushman actually intended to defraud its creditors. Appellant contests this determination and contends that Cushman's knowing acquiescence in Seaboard's financing arrangement establishes that Cushman intended to conceal the preference Seaboard received and that a transfer accompanied by such an intent is fraudulent within the meaning of § 67d(2)(d) of the Bankruptcy Act.

Here, as in appellant's argument under the Uniform Commercial Code, the argument gains most of its force from the fact that the use of Bakers made it less likely that Cushman's other creditors would discover the preference granted Seaboard in time to ensure that the transfer would be voidable by the trustee in bankruptcy. Again the mere fact that a preference is involved has no special significance. Although every preferential payment to a creditor has the effect of hindering or delaying other creditors from collecting their judgments, it is well established that granting a security interest to secure funds with which the debtor intends to pay a preexisting debt does not necessarily imply an intent to "hinder, delay or defraud creditors" within the meaning of § 67d(2)(d) of the Act. 4 Collier, *supra* at 534. *See Dean* v. *Davis,* 242 U.S. 438, 444 (1916); *Coder* v. *Arts,* 213 U.S. 223, 242 (1909). The mortgage may be made in the expectation that, thereby, the debtor will extricate himself from a particular difficulty and be enabled to promote the interests of all other creditors by continuing his business. *See* 4 Collier, *supra,* at 542; *Dean* v. *Davis, supra,* at 444.

In recognition of these principles, appellant concedes that he must do more than establish that Cushman preferred Sea-Board or that Cushman failed to disclose Seaboard's interest in the secured transaction. He must show that Cushman's necessary objective in doing so was to prejudice its other creditors' ability to secure the benefits of the Bankruptcy Act. We agree with appellant that his claim may succeed without direct evidence of Cushman's actual intent. It will be enough if appellant demonstrates that Cushman transferred the security interest "under circumstances which forbid any reasonable conclusion other than that the purpose of the transfer was fraudulent as to his creditors." 4 Collier, *supra,* at 537. However, we agree with the district court that there is no evidence that such was the case here.

Appellant argues that the circumstances which transforms this potentially preferential transfer into a fraudulent conveyance is the fact that Cushman acquiesced in the arrangement that the financing statement would fail to disclose Seaboard's interest in the secured transaction. Appellant characterizes the statement as "concealing" Seaboard's interest and notes that secrecy and concealment have long been recognized as "badges of fraud". Under the circumstances, however, Cushman's conduct was entirely consistent with an intent to protect its creditor standing, to continue in business, and to rehabilitate itself financially. Although the financing statement failed to disclose Seaboard's interest, the loan transaction followed the normal business practices of the parties. It is uncontested that Bakers acted as Seaboard's nominee in all transactions in which Seaboard lent money to bakers. Seaboard's purpose in using Bakers as its nominee was so that other bakers would not know that Seaboard was financing one of their competitors and other flour suppliers would not know that Seaboard had loaned money to Cushman, both legitimate business purposes. The long period of negotiation preceding the consummation of the loan and Seaboard's full disclosure of the facts to Union Mutual provide affirmative evidence that Cushman was primarily interested in promoting its own legitimate business interests. We see no basis for reversing the decision of the district court on this point.

None of the cases appellant relies upon support his assertion that the circumstances in this case forbid any reasonable conclusion other than that Cushman's purpose was fraudulent as to its creditors. The case appellant relies upon most heavily, *Dean* v. *Davis, supra,* illustrates the kind of transaction that will be held to be fraudulent as to creditors and provides no support for appellant. In *Dean,* the bankrupt, to avert a criminal prosecution, had mortgaged virtu-

ally all his assets to secure a note that had matured the day before it was given. The bankrupt's conduct was utterly inconsistent with any intent to rehabilitate himself financially. The bankrupt knew he was insolvent; he must have known that suspension of his business and bankruptcy would result from giving and recording a mortgage of all his property to secure a note that matured before the mortgage was executed. The bankrupt willfully sacrified his property and his other creditors to avert a threatened criminal prosecution. *Dean* v. *Davis, supra,* at 445. Obviously, Cushman's conduct was in no respect comparable. Apart from the fact that Cushman extended Seaboard a preference, its conduct did not necessarily result in sacrificing the interests of Cushman's creditors.

The other major line of cases that appellant relies upon are cases in which the mortgagee-lender, pursuant to an agreement with the mortgagor-debtor, withheld the mortgage from record. *See, e.g., Blennerhassett* v. *Sherman,* 105 U.S. 100 (1881); 4 Collier, *supra,* at 538. Appellant maintains that if the transferor's agreement to fail to record a mortgage establishes a fraudulent conveyance, then the concealment implicit in the use of a nominee should also constitute a fraudulent conveyance. The problem with appellant's argument is that it ignores the reason transfers pursuant to an agreement not to record the mortgage are fraudulent. The reason is not, as appellant asserts, simply that a preference is concealed. Rather, the reason is that the necessary purpose of such agreements is to prevent any further impairment of the mortgagor's credit. *See Blennerhassett* v. *Sherman, supra,* 105 U.S. at 115. In the case at bar, the security interest was recorded, so it is clear that Cushman did not intend to conceal the encumbrances on its property and thereby enable it to contract obligations on the basis of its seemingly clear ownership. We note, moreover, that the

bankrupt's use of a nominee as mortgagee has been held not to be even a badge of fraud. *See In re Locust Bldg. Co., Inc.,* 299 F. 756 (2d Cir), *cert denied,* 265 U.S. 590 (1924); Collier, *supra,* at 538.

Although, as the district court noted, it may be wiser and more progressive public policy to require full disclosure of potentially preferential secured transactions, neither the Maine UCC nor the Federal Bankruptcy Act can be interpreted as adopting such a policy.[12] Any changes in these laws is a function for legislation. Accordingly, the district court's decision that the secured transactions were properly perfected and not fraudulent is affirmed.

III. *The Applicability of Section 11e to a Trustee's Section 57 Objection to the Allowance of a Claim*

After determining that Bakers' claim of $65,561.51 was unsecured, the bankruptcy judge, acting pursuant to § 57g of the Act, 11 U.S.C. § 93(g), went on to disallow both that claim and Seaboard's unsecured claim of $42,756.99, unless voidable preferences in the amount of $108,940.02 were surrendered. In so ruling, he held that the trustees's § 57g objections were not barred by the two year statute of limitations prescribed in § 11e of the Act and that the amounts Bakers received on Cushman's $75,000 note during the four month period prior to the filing of Chapter XI proceedings and the payments Cushman made Seaboard for flour shipments during that four month period were voidable preferences. The district court reversed, holding that § 11e's two year statute of limitations operated as a bar to the trustee's

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[12] A rule requiring the disclosure of potentially preferential secured transactions would present problems of its own. With most preferential transfers there is no possibility of disclosure of the preference to other creditors since there is no public record of the payment of a preexisting debt. Since unsecured potentially preferential transfers would not be affected by such a rule, it may well be questioned whether its limited coverage would be either useful or rationally justified.

objections. Because its ruling on the statute of limitations was dispositive, the district court did not consider whether the payments Seaboard received for flour shipments were voidable preferences. We hold that § 11e's time limitation does not apply to objections to the allowance of a claim unless voidable preferences are first surrendered and that the only time limitations on a trustee's ability to present objections to the allowance of a claim are those flowing from the equitable doctrine of laches. The bankruptcy judge ruled that laches did not bar consideration of the trustee's objections. We remand to the district court to review the bankruptcy judge's determination that laches was not a bar and the determination that the payments made to Seaboard[13] were voidable preferences.[14]

We note at the outset that no other federal court of appeals has squarely confronted the question of § 11e's applicability to a trustee's objection to the allowance of a claim.[15] A leading authority on bankruptcy takes the position that objections to the allowance of a claim may be made at any time prior to the allowance of the claim, subject only to the doctrine of laches. 3 Collier, *supra*, at ¶ 57.18[2]. The cases cited in support of this proposition, however, were all decided prior to 1938, the year § 11e was added to the Bank-

[13] Since this court has affirmed the district court's holding that Bakers had a valid secured claim, the payments made to Bakers on Cushman's $75,000 note are not voidable preferences, which could provide the basis for a § 57g objection. 3 Collier, *supra*, ¶ 60.22.

[14] Although we remand the question of the applicability of the laches doctrine, we feel constrained to state that, on the basis of the facts that the parties emphasized on appeal, we doubt that the bankruptcy judge erred in holding that the doctrine of laches did not bar consideration of the trustee's objections. We elect to remand this issue because the parties did not brief it and we, therefore, cannot exclude the possibility that the record may contain facts supporting a finding that laches should operate as a bar to the trustee's objection.

[15] In *In re Haupt & Co.*, 390 F.2d 251 (2 Cir. 1967), the parties stipulated that § 11e's two year limitation applied to a trustee's objection to the allowance of a claim. The court, understandably, having no reason to treat the applicability of § 11e as an issue, did not discuss it. We therefore do not look on the case as reasoned authority on this point.

ruptcy Act, but there is nothing to suggest that this authority has not considered § 11e's possible applicability and rejected it. In deciding whether § 11e applies to a trustee's § 57 objection to the allowance of a claim, we consider the statutory language itself, the relationship between § 11e and the Act as a whole, and the nature and objectives of § 57's allowance process.

The statutory language can be interpreted to support either the appellant or the appellee. Section 11e provides that a trustee "may within two years subsequent to the date of adjudication . . . , institute proceedings in behalf of the estate upon any claim against which the period of limitations fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy." 11 U.S.C. § 29(e). The most natural interpretation of this language "institute proceedings . . . upon any claim" is that it refers to the institution of a separate action by the trustee which, if the trustee's claim is well-founded, will entitle the trustee to recover on behalf of the estate.[16] A trustee's objection to the allowance of a claim is manifestly not the institution of a proceeding that will entitle the trustee to recover on behalf of the estate.[17] Here, where the objection was not made within two years of the date of adjudication, the trustee's objection would not invest the bankruptcy court with jurisdiction to order that the creditor-claimant pay the amount of the voidable preferences he received over to the estate.

Although this interpretation of "institute proceedings . . .

[16] Section 11e clearly applies to actions instituted by the trustee to *recover* the amount of voidable preferences that a creditor has received. *Herget* v. *Central National Bank*, 324 U.S. 4 (1945).

[17] We recognize that, if the trustee presents his § 57g objection within two years, the trustee can convert his objection to the allowance of a claim, unless voidable preferences are surrendered, into a proceeding for an affirmative recovery of the amount of the voidable preferences the creditor-claimant received. *Katchen* v. *Landry*, 382 U.S. 323(1966). *See* Rules of Bankruptcy Procedure 306, 701. Here appellant concedes that § 11e precluded him from affirmatively recovering the amount of the preferences.

upon any claim" is the most natural one, the statutory language could be construed more expansively to include § 57 objections to the allowance of a claim. The argument is that the trustee is "instituting proceedings" in which the bankruptcy court will adjudicate whether the creditor's claim can be allowed without the surrender of some allegedly voidable preferences. The "claim" of the estate is the estate's asserted right not to pay the creditor anything unless the allegedly voidable preferences are surrendered. Although this second interpretation of "institute proceedings . . . upon any claim" places a slight strain on the statutory language, it is clear that § 11e will bear an interpretation that would render it applicable to objections to the allowance of claims.

To decide whether § 11e should be applicable, we consider the scheme of the Act as a whole and the nature and objectives of § 57's allowance process. The scheme of the Bankruptcy Act seems to us to support appellant's contention that § 11e is inapplicable to an objection to the allowance of a creditor's claim under § 57. Under § 11e the statute of limitations begins to run on the "date of adjudication". As regards the allowance process, however, the date of adjudication has no significance whatsoever, and to treat a trustee's objection as barred if not made within two years would in some circumstances be anomalous. Under § 57n, a creditor must file his claims within six months after the first date set for the first creditor's meeting — which § 55, 11 U.S.C. § 91, provides must be held not less than ten nor more than thirty days after the date of adjudication. Thus, it is possible that a creditor might not file his claim until seven months after the date of adjudication. It would, at least, be incongruous to have a two year statute of limitations begin to run before the trustee had any cause to file objections

More importantly, there are circumstances in which a

creditor may file his claim more than two years after the date of adjudication. Section 57n permits creditors, whose claims were not filed within six months of the date of the first creditor's meeting, to file claims against any surplus remaining after all duly filed claims have been allowed and paid in full. To hold § 11e applicable to § 57 objections could absolutely preclude some trustees from objecting to the allowance of a claim against a surplus. Holding § 11e applicable, without more, would be inconsistent with the scheme of the Act. We recognize that it would be possible for courts to avoid these incongruities by utilizing tolling principles or by giving a flexible construction to § 11e's "date of adjudication". But we see no reason to create such a maze, especially since there are affirmative reasons § 11e should not apply to trustee objections to the allowance of a claim. Holding § 11e applicable would be inconsistent with the nature and objectives of the allowance process.

The allowance process historically has been characterized by flexibility and has been free of burdensome technical rules. *See* 3 Collier, *supra,* ¶ 57.17[1]. This flexibility has continued to characterize the process through each of the revisions of the Bankruptcy Act. *See* id. ¶ 57.17, ¶ 57.18. This flexibility is exemplified by § 2a(2) and § 57k, which empower the bankruptcy court, upon petition of the trustee, to reconsider allowed or disallowed claims and allow them or disallow them at any time before the estate has been closed.[18] Although these provisions do not clearly suggest that § 11e

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[18] *See also* § 57f of the Bankruptcy Act, 11 U.S.C. § 93(f) which provides that "objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and claimants will permit". Although, as the district court noted, § 57f does not create any substantive or procedural rights in the trustee, it does provide some indication that the allowance process was intended to be free of burdensome technical rules governing the timing of the filing of objections. *See* Collier, *supra,* ¶ 57.1[1]. Although § 57f was not carried over into the Bankruptcy Rules of 1973, the discretion with regard to the time for determining the objections is unchanged. *Id.* at 273. Hence, nothing in the new Bankruptcy Rules undermines our reliance upon § 57f.

is inapplicable to trustee objections to the allowance of a claim, they do suggest that the primary objective of the allowance process is to ensure that the ultimate distribution of the bankrupt estate comports with the requirements of the Bankruptcy Act. Since a strict time limitation upon the filing of objections would be inconsistent with the attainment of that goal, these sections support the conclusion that § 11e should not operate as a bar to the consideration of the trustee's objections to the allowance of a claim.

'Although admittedly these provisions provide little direct support for our conclusion, we note that there are no affirmative reasons for holding that § 11e applies to objections to the allowance of a claim. Normally statutes of limitations are designed to avoid the problems associated with the litigation of stale claims and to bring about an end to uncertainty involving potential legal liability. Sections 2a(2) and 57k suggest that during the period before the estate is finally settled, the interest in repose has been subordinated to other values under the scheme of the Bankruptcy Act. The problems associated with the litigation of stale claims will be avoided under our holding that the doctrine of laches applies to a trustee's objection to the allowance of a claim. For example, an unreasonable delay which prejudices the claimant's ability to refute the trustee's objection will constitute laches which will bar consideration of the objections. *See* 3 Collier, *supra*, at 291. The doctrine of laches will promote the positive values of a statute of limitations without unduly impairing the attainment of the primary objective of the allowance process: correct distribution of the bankrupt estate.

It should be apparent that it will generally be to the trustee's disadvantage to wait more than two years after the date of adjudication to object that a claim should not be allowed unless voidable preferences are surrendered. If the

objection is made within two years, the trustee can affirmatively recover the full amount of the voidable preference. *See Katchen* v. *Landry*, 382 U.S. 323 (1966); Rules of Bankruptcy Procedure 306, 701.[19] If the objection is not made within the two year period, the bankruptcy court's disallowance of the claim will rarely leave the estate in as good a position as it would have been in if the estate had recovered the amount of the voidable preference. Even in those cases where the creditor's claims are in excess of the amount of the voidable preferences, it is not likely that the creditor's distributive share, which the estate would not have to pay out if the objection were successful, would be greater than the amount of the voidable preference. Thus, our decision will, in no way, encourage trustees to wait two years before presenting their objections. In those cases in which the trustee fails to present his claim within the two year period, however, the purposes of § 57g and the scheme of the Act require that, subject only to the doctrine of laches, the bankruptcy court should rule on the merits of the trustee's objections.

• • • • .

We reverse the portion of the district court decision dealing with Seaboard's unsecured claim and remand for consideration of the timeliness of appellant's objection under the laches doctrine and, if necessary, of the correctness of the bankruptcy court's ruling that Seaboard received voidable preferences. In all other respects, the decision of the district court is affirmed.

Affirmed in part, and reversed and remanded in part.

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[19] Even if the recipient of the voidable preference has not filed a claim, the trustee may institute an independent action in federal court to recover the amount of the preference. *See Herget* v. *Central Nat'l Bank & Trust Co.*, *supra*.

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Appendix B.

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SOUTHERN DIVISION

In the Matter of	:	In Bankruptcy
Cushman Bakery and	:	
Cushman Baking Company,	:	Nos. BK-68-786/787
Bankrupts	:	Consolidated

Opinion and Order of the Court

GIGNOUX, J.

Bakers Management Corporation (hereinafter referred to as "Bakers") and Seaboard Allied Milling Corporation (hereinafter referred to as "Seaboard") appeal from an order of the Bankruptcy Judge entered in these consolidated bankruptcy proceedings. By his order, the Bankruptcy Judge declared invalid a secured claim in the amount of $65,500 filed by Bakers because "the real and personal property transfers were not properly perfected and in any event were fraudulent," and further disallowed pursuant to Section 57g of the Bankruptcy Act, 11 U.S.C. § 93(g), that claim as well as an unsecured claim in the amount of $42,756.99 filed by Seaboard, unless voidable preferences in the amount of $108,940.02 were surrendered.

I

The Factual and Procedural History

Cushman Baking Company and Cushman Bakery (hereinafter sometimes collectively referred to as "Cushman") are interrelated corporations which operated bakeries for many years in

Portland, Maine and Lynn, Massachusetts. Cushman Baking Company operated the Portland plant, and Cushman Bakery operated the Lynn plant until its closing in 1967. Seaboard had supplied flour to Cushman for some 30 to 40 years on an open-account basis, payable 30 days after delivery. In the latter part of 1967 Cushman had encountered financial difficulties, its account with Seaboard was as much as 90 days in arrears, and it owed Seaboard $31,624.65 for flour shipments.

In January 1968, following several meetings between officers of Cushman and Seaboard, Seaboard agreed to lend Cushman $75,000 for working capital, to be secured by second mortgages on the real and personal property located in Portland and an assignment of a second mortgage on the Lynn plant which was held by Cushman Baking Company to secure an inter-company indebtedness of $100,000. Although Seaboard was to supply the money for the loan, it was to be granted in the name of Bakers as Seaboard's nominee. Bakers was an affiliated Massachusetts corporation which had customarily acted as Seaboard's nominee in loan transactions. As part of the loan transaction, it was also agreed that Cushman would purchase from Seaboard a minimum of 50,000 cwt. of flour annually, so long as any part of the $75,000 loan remained unpaid. This agreement was incorporated in a Flour Purchase Agreement signed on February 16, 1968. Finally, it was contemplated that Seaboard would be secured for future shipments of flour by an assignment from Bakers to Seaboard of the mortgages given as security for the $75,000 loan.

The loan was closed on March 6, 1968. The documents reflect that on February 12 Union Mutual Life Insurance Company (hereinafter referred to as "Union Mutual"), the holder of the first mortgage on Cushman's real property in Portland, had consented to Cushman giving a second mortgage on its Portland property to secure payment of the $75,000 loan and future flour purchases pursuant to the terms of the Flour Purchase Agreement. At the closing, Bakers' check for $75,000 was delivered to Cushman, and Cushman delivered to Bakers Cushman Baking Company's promissory note dated February 16, 1968 for $75,000 payable to Bakers (as nominee for Seaboard). This

note was secured by three separate documents: (1) a second mortgage on Cushman's real property in Portland dated February 16, 1968; (2) a second mortgage on Cushman's real property in Portland dated February 12, 1968; and (3) an assignment of the second mortgage on Cushman's Lynn property. The second mortgage on the Portland real estate was recorded in the Cumberland County, Maine, Registry of Deeds on March 6, 1968. Two financing statements to perfect the second security interest in the Portland personalty were filed, one in the Cumberland County Registry of Deeds and the other in the office of the Secretary of State of Maine, both on March 8, 1968. The real estate mortgage identifies Cushman Baking Company as the mortgagor and Bakers as the mortgagee. The financing statements identify Cushman Baking Company as the debtor and Bakers as the secured party. The assignment of the security instruments from Bakers to Seaboard was never executed. Because of this failure, which was not discovered until sometime after Seaboard had filed its claim with the Court in September 1969, Seaboard has conceded that its claim for $42,756.99 is unsecured.

Upon receiving Bakers' check for $75,000 at the March 6 closing, Cushman gave Seaboard its check for $73,961.67. This amount represented Cushman's then current indebtedness for flour shipments, which had increased from $31,624.65 to $61,873.45, and the price of two February shipments of flour which had been stopped in transit and which were then released by Seaboard.

Subsequent to the loan closing, Seaboard continued to ship to Cushman between $25,000 and $30,000 worth of flour monthly in accordance with the Flour Purchase Agreement. All told, during the four-month period preceding the filing of Chapter XI proceedings on August 13, 1968, Cushman paid Seaboard $101,941.02 for shipments totaling $144,698.01. As a result, as of the date of the Chapter XI proceedings Seaboard was owed $42,756.99, the amount of the claim it filed in the Bankruptcy Court. In addition, during this four-month period, Cushman paid four monthly installments due on the $75,000 note, each in the amount of $2,333. Accordingly, as of the date of the

Chapter XI proceedings, there remained unpaid on the note for principal and interest a balance of $65,561.51, the amount of the claim filed by Bakers in the Bankruptcy Court. The Bankruptcy Judge found, and his finding is amply supported by the evidence, that Cushman Baking Company and Cushman Bakery were individually and collectively insolvent, within the meaning of Section 60a of the Bankruptcy Act, 11 U.S.C. § 96(a), at all times during the four-month period prior to the initiation of the Chapter XI proceedings on August 13, 1968.

On August 13, 1968, Cushman Baking Company and Cushman Bakery filed separate petitions, subsequently consolidated, for an arrangement under Chapter XI of the Bankruptcy Act, 11 U.S.C. § 701 *et seq.* On June 2, 1969, after it became apparent that a plan could not be proposed, both corporations were adjudicated bankrupt pursuant to Section 376(2) of the Act, 11 U.S.C. § 776(2). Thereafter, on September 29, 1969, Bakers filed a proof of claim and a petition to establish a lien in the amount of $65,561.51, based upon the $75,000 note and the real and personal property second mortgages given by Cushman Baking Company to Bakers on March 6, 1968. Also on September 29, 1969, Seaboard filed a proof of claim and a petition to establish a lien in the amount of $42,756.99, based upon the February 16, 1968 Flour Purchase Agreement and an assignment from Bakers to Seaboard of the Cushman Baking Company note and second mortgages. As previously indicated, however, Seaboard eventually conceded that its claim was unsecured since the contemplated assignment had not been made.

More than a year later, on November 16, 1970, the Trustee in bankruptcy filed formal objections to the establishment of Bakers' and Seaboard's liens, alleging that the security transactions were not properly authorized by Cushman Baking Company's directors and, further, that, as "secret liens," they constituted a fraud on creditors. Nine months thereafter, on August 18, 1971, the Trustee amended his objections to Bakers' secured claim and also filed an objection to Seaboard's unsecured claim on the ground that it should be disallowed pursuant to Section 57g of the Bankruptcy Act, unless Seaboard surrendered voidable preferences of $102,000. On September 24, 1971, Seaboard moved

to dismiss this objection on the ground that it was barred by the two-year statute of limitations contained in Section 11e of the Act, 11 U.S.C. § 29(e). Later, on January 7, 1972, the Trustee filed an identical objection to Bakers' claim, asserting that it should be disallowed unless voidable preferences of $7,000 were surrendered.

A hearing on the merits was finally held before the Bankruptcy Judge on June 6 and 7 and July 12, 1972. A year and a half later, on January 25, 1974, the Bankruptcy Judge filed an extensive opinion and the order from which Bakers and Seaboard have appealed. The Bankruptcy Judge held that Bakers' secured claim of $65,500 [*sic*] was invalid because the real and personal property security interests were not properly perfected and, further, were fraudulent transfers under Section 67d(2)(d) of the Bankruptcy Act, 11 U.S.C. § 107(d)(2)(d). Having determined that Bakers' claim was unsecured, he further held that the Trustee's objections to that claim and to Seaboard's unsecured claim of $42,756.99 were not barred by the statute of limitations, and he disallowed both claims pursuant to Section 57g of the Act unless voidable preferences in the amount of $108,940.02 were surrendered.

For the reasons to be stated, the Court holds that the Bankruptcy Judge erred in these rulings and that the order declaring invalid Bakers' secured claim and disallowing both that claim and Seaboard's unsecured claim, unless voidable preferences are surrendered, must be reversed.

II

The Invalidation of Bakers' Secured Claim

Perfection of Security Interests. The principal basis of the Bankruptcy Judge's invalidation of Bakers' secured claim was that Bakers had not perfected its security interests, and the security transactions were therefore invalid as against the Trustee in bankruptcy in his capacity as a hypothetical lien creditor, Bankruptcy Act § 70c, 11 U.S.C. § 110(c), because the recorded

real estate mortgage and personal property financing statements failed to disclose that Seaboard was the "real secured party." This conclusion is clearly erroneous.

The Bankruptcy Judge correctly observed that Maine's statutory law requires that real and personal property security transactions must be properly recorded in order to be effective as against third persons. But the record is clear that Bakers complied in all respects with the relevant recording statutes and disclosed all the information which the Maine statutes governing the recording of security interests in real and personal property require. In order to perfect a security interest in real estate, Maine law requires only that a properly executed and acknowledged real estate mortgage be recorded in the appropriate registry of deeds and cross-indexed under the names of the mortgagee and mortgagor. 33 M.R.S.A. §§ 151, 201, 203 and 651. Under the Maine Uniform Commercial Code's concept of "notice filing," perfection of a security interest in personal property requires only the filing of a financing statement which discloses merely the names and addresses of the secured party and the debtor, and indicates the type of collateral. 11 M.R.S.A. §§ 9-301, 9-302, 9-401 and 9-402.[1] A properly executed and authenticated real estate mortgage was admittedly filed by Bakers in the Cumberland County Registry of Deeds, and financing statements conceded to be sufficient under the Uniform Commercial Code were filed in the Cumberland County Registry of

[1] Section 9-301 provides that an unperfected security interest is subordinate to the right of lien creditors. Section 9-302 requires the filing of a financing statement in order to perfect a security interest. Section 9-401 requires that the financing statement be filed in the office of the Secretary of State, and if any part of the collateral is goods which are fixtures, then a financing statement must also be filed in the appropriate registry of deeds. Section 9-402(1) sets forth the formal requisites of a financing statement. It provides in relevant part:

> (1) A financing statement is sufficient, if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. . . .

Section 9-402(3) prescribes a form which complies with Section 9-402(1)

Deeds and the office of the Secretary of State of Maine. The real estate mortgage disclosed the names of Bakers as the mortgagee and Cushman Baking Company as the mortgagor. The financing statements listed Bakers as the secured party and Cushman Baking Company as the debtor. Maine law requires no more in order that real and personal property security transactions be effective as against third parties.

While conceding that the recording statutes impose no requirement that the name of the "real secured party" be disclosed in order to perfect a security interest, the Bankruptcy Judge held that such a disclosure was necessary to enable third persons to determine the "true nature" of the transaction. The flaw in this conclusion is that under the Uniform Commercial Code's system of notice filing, a financing statement is not intended to function as a means for disclosing the "true nature" of the transaction. As the Official Comment to Section 9-402(1) of the Code states: "The notice itself indicates merely that the secured party who has filed *may* have a security interest in the collateral described. Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs. Section 9-208 provides a statutory procedure under which the secured party, at the debtor's request, may be required to make disclosure."[2] 11 M.R.S.A. § 9-402, Uniform Commercial Code

[2] In part, Section 9-208, 11 M.R.S.A. § 9-208, provides:

> (1) A debtor may sign a statement indicating what he believes to be the aggregate amount of unpaid indebtedness as of a specified date and may send it to the secured party with a request that the statement be approved or corrected and returned to the debtor. . . .
>
> (2) The secured party must comply with such a request within 2 weeks after receipt by sending a written correction or approval. . . . If the secured party without reasonable excuse fails to comply, he is liable for any loss caused to the debtor thereby; and if the debtor has properly included in his request a good faith statement of the obligation or a list of the collateral or both, the secured party may claim a security interest only as shown in the statement against persons misled by his failure to comply. If he no longer has an interest in the obligation or collateral at the time the request is received, he must disclose the name and address of any successor in interest known to him and he is liable for any loss caused to the debtor as a result of failure to disclose. . . .

Comment 2 (emphasis supplied). Accordingly, the decided cases have made clear that a financing statement is intended merely to "put a searcher on notice that an underlying security agreement may be outstanding. A properly filed financing statement would thus serve its intended purpose if a subsequent party would have been put on notice of an outstanding security agreement." *Bramble Transportation, Inc. v. Sam Senter Sales, Inc.*, 294 A.2d 97, 103 (Del. 1971). *See also In re King-Porter Co.*, 446 F.2d 722, 729 (5th Cir. 1971); *Wolf v. Aero Factors Corp.*, 126 F. Supp. 872, 876 (S.D.N.Y. 1954), *aff'd per curiam*, 221 F.2d 291 (2d Cir. 1955); *John Deere Co. v. William C. Pahl Const. Co.*, 300 N.Y.S.2d 701, 703 (1969); *National Cash Register Co. v. Firestone and Co.*, 191 N.E.2d 471, 474 (Mass. 1963).

The Bankruptcy Judge has cited no case which required the disclosure of the real party in interest as a prerequisite to perfection of a security interest in either real or personal property. All of the cases cited by him involved errors in a financing statement itself, such as misdescription of the debtor or secured party, or an inaccurate or incomplete address, which would seriously mislead third parties searching the record. *See In re Raymond F. Sargent, Inc.*, 8 UCC Rep. Serv. 583 (D. Me. 1970); *In re Brawn*, 6 UCC Rep. Serv. 1031 (D. Me. 1969); *Bank of North America v. Bank of Nutley*, 227 A.2d 535 (N.J. 1967); *National Cash Register Co. v. Valley National Bank of Long Island*, 5 UCC Rep. Serv. 396 (N.Y. Sup. Ct. 1968); *John Deere Co. v. William C. Pahl Const. Co., supra; In re Thomas*, 466 F.2d 51 (9th Cir. 1972); *Strevell-Paterson Finance Co. v. May*, 422 P.2d 366 (N.M. 1967); *Burlington National Bank v. Strauss*, 184 N.W.2d 122 (Wis. 1971).[3] In the present case, there is no suggestion of any error in the security instruments filed by Bakers.

It is also clear that the recording of the real estate mortgage and financing statements was entirely proper despite the fact that Bakers, as Seaboard's nominee, rather than Seaboard, as the principal creditor, was named as the mortgagee and secured party. The use of a nominee in real estate transactions, and as the mortgagee in a recorded mortgage, has long been sanctioned

as a legitimate practice. *Eastern Milling Co. v. Flanagan*, 130 A.2d 925 (Me. 1957); *Amherst Factors v. Kochenburger*, 173 N.Y.S.2d 570, 573 (1958); *Richardson v. Stewart*, 247 N.W. 273, 274 (Iowa, 1933); *First Nat. Bank of Bridgeport v. National Grain Corp.*, 131 A. 404, 406 (Conn. 1925); *Newton Sav. Bank v. Howerton*, 145 N.W. 292, 293 (Iowa, 1914); *Johnson v. Wilson & Co.*, 34 So. 392, 393 (Ala. 1903). And as noted in *Industrial Packaging Products Co. v. Fort Pitt Packaging International, Inc.*, 161 A.2d 19, 21 (Pa. 1960),

> The Uniform Commercial Code does not require that the secured party as listed in such statement be a principal creditor and not an agent. . . . The purpose of filing this financing statement is to give notice to potential future creditors of the debtor or purchasers of the collateral. It makes no difference as far as such notice is concerned whether the secured party listed in the filing statement is a principal or agent, and no provision in the Uniform Commercial Code draws such a distinction.

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[3] As the Bankruptcy Judge recognized, minor errors in real estate mortgages and financing statements which are not seriously misleading are not fatal "as long as the statement provides sufficient additional information to enable a prudent examiner to ascertain the exact state of affairs by further inquiry." In re Colorado Mercantile Co., 299 F. Supp. 55, 58 (D. Colo. 1969). *See also* McCausland v. York, 133 Me. 115 (1934) (real estate mortgage); In re Excel Stores, Inc., 341 F.2d 961 (2d Cir. 1965); National Cash Register Co. v. Firestone & Co., Inc., *supra*; In re Platt, 257 F.Supp. 478 (E.D. Pa. 1966); Silver v. Gulf City Body & Trailer Works, 432 F.2d 992 (5th Cir. 1970); In re Bengston, 3 UCC Rep. Serv. 283 (D. Conn. 1965); Rooney v. Mason, 394 F.2d 250 (10th Cir. 1968); In re French, 317 F. Supp. 1226 (E.D. Tenn. 1970) (financing statements). Section 9-402(5) of the Uniform Commercial Code, 11 M.R.S.A. § 9-402(5) provides:

> A financing statement substantially complying with the requirements of this section is effective, even though it contains minor errors which are not seriously misleading.

See also In re Fried Furniture Corp., 293 F. Supp. 92 (E.D.N.Y. 1968).[4]

Finally, there is no legal basis for the Bankruptcy's Judge's assertion that in order to prove perfection of its security interest, "it must be clearly demonstrated that the secured party of record was always able and willing to disclose the identity of the real secured party involved." Neither the Maine real estate recording statutes nor the Uniform Commercial Code imposes any such burden. Indeed, as previously indicated, under the system of notice filing adopted by the Code, the financing statement is not intended to furnish full information concerning the security transaction. Rather, as stated in the Official Comment to Section 9-402, *supra,* its intended purpose is to place third persons on notice that "further inquiry from the parties concerned will be necessary to disclose the complete state of affairs." It is thus clear that the burden of inquiry is on third persons, not on the secured party. "The Code helps only those who help themselves." *In re King-Porter Co., supra,* 446 F.2d at 729. It is true that Section 9-208 of the Code, *supra* n.2, requires the secured party to furnish information concerning the transaction upon request, and imposes sanctions for its failure to do so. But there is no evidence in the present record that any third party attempted to contact either Cushman or Bakers to obtain further information about the security transaction, or that either Cushman or Bakers failed to respond to any such request.

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[4] That the Uniform Commercial Code does not require disclosure of the name of the real party in interest in a security transaction is further evident from the Code's treatment of assignments of security interests. Section 9-405(1) of the Code, 11 M.R.S.A. § 9-405(1), states that

> A financing statement *may* disclose an assignment of a security interest in the collateral described in the statement by indication in the statement of the name and address of the assignee or by an assignment itself or a copy thereof on the face or back of the statement. . . . (emphasis supplied).

The Official Comment to this Section makes clear that this provision is permissive only and that under 9-302(2), 11 M.R.S.A. § 9-302(2), no filing of an assignment is necessary to continue the perfected status of a security interest. 11 M.R.S.A. § 9-405, Uniform Commercial Code Comment.

It may be wiser and more progressive public policy to require disclosure of the "real secured party" in recorded security instruments. The Maine Legislature, however, has not seen fit to adopt such a policy, and legislation is not the function of either the Bankruptcy Judge or this Court.

Fraudulent Transfer. As an alternative basis for invalidating Bakers' secured claim, the Bankruptcy Judge held that the security transactions were invalid as against the Trustee in bankruptcy (*see* Sections 70c and 70e(1) of the Bankruptcy Act, 11 U.S.C. § 110(c) and 110(e)(1)) because they were fraudulent under Section 67d(2)(d) of the Act, 11 U.S.C. § 107(d)(2)(d),[5] and the statute of 13 Eliz. c. 5 (1570).[6] Under these statutes, a transfer for fair consideration is fraudulent if the transferor had an actual intent "to hinder, delay, or defraud creditors."[7] *See* 4 Collier, *supra* note 6, ¶ 67.37[1]. In concluding that the transfers were fraudulent, the Bankruptcy Judge found that it was unnecessary to consider whether Cushman, the transferor, had an actual intent to "hinder, delay, or defraud" creditors,

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[5] Section 67d(2)(d) of the Bankruptcy Act provides:

> Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition under this Act by or against him is fraudulent . . . (d) as to then existing and future creditors, if made or incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors.

[6] This statute has been adopted as part of Maine's common law. It declares "utterly void," as against creditors, any conveyance made with intent to "delay, hinder, or defraud creditors." Butler v. Moore, 73 Me. 151, 154-55 (1882). *See also* 4 Collier on Bankruptcy ¶ 67.37[1] at 530 (14th ed.) (hereinafter cited as Collier).

[7] Clauses (a), (b) and (c) of paragraph 2 of section 67d of the Bankruptcy Act render fraudulent transfers made for less than fair consideration. Under these clauses, and under paragraphs (3) and (4) of Section 67d, fraudulent intent is predicated in law because of the circumstances in which the transfers are made. Under clause (d) of paragraph 2 of Section 67d, fraudulent intent is not presumed in law. A transfer for fair consideration can only be made fraudulent upon proof of actual intent to hinder, delay, or defraud creditors. *See* 4 Collier ¶ 67.37[1].

because Seaboard was "in a unique position to dominate or control the manner in which Cushman's property was disposed." In these circumstances, the Bankruptcy Judge concluded that proof that Seaboard had the requisite intent would be sufficient to establish the transfers as fraudulent. With this determination, also, the Court must disagree.

The Bankruptcy Judge cited as authority for this holding *Langan v. First Trust and Deposit Co.*, 59 N.E.2d 424 (N.Y. 1944), and 4 Collier ¶ 67.37[2]. *See also In re Southern Land Title Corp.*, 316 F. Supp. 1059, 1066 (E.D. La. 1970), *aff'd*, 474 F.2d 1033, 1039 (5th Cir. 1973). In *Langan* a bank had taken over the management of the affairs of the bankrupt, and the court held that the bank's proven intent to hinder, delay, or defraud creditors dispensed with the necessity to prove that the bankrupt itself had such intent. The relevant section of Collier's states the *Langan* rule as follows:

> Where the transferee or obligee is in a position to dominate or control the bankrupt's disposition of his property, however, his intent to hinder, delay, or defraud creditors would seem sufficient to render the transfer or obligation fraudulent within § 67d(2)(d) without respect to the purpose of the bankrupt. 4 Collier, *supra* at 533.

The application of the *Langan* rule to this case was inappropriate since Seaboard clearly did not have such domination or control over Cushman as to dispense with the necessity of proving that Cushman had an actual intent to hinder, delay, or defraud creditors. The record shows that the loan transaction was the result of extended negotiations between the officers of independently controlled and nonaffiliated corporations, all of whom were knowledgeable and sophisticated businessmen. Cushman, concededly experiencing financial difficulties, needed credit and a reliable source of flour. Seaboard desired security for Cushman's outstanding indebtedness and the continuance of Cushman as a customer for its flour. The ultimate arrangement was consistent with an arm's-length transaction which advanced the legitimate business interests of both parties. *See In re Southern Land Title Corp., supra*, 316 F. Supp. at 1065. The record

simply does not support the conclusion that Seaboard was "in a unique position to dominate or control" Cushman. Consequently, in order to show that the transfers were fraudulent, it was necessary to demonstrate that Cushman had an actual intent to hinder, delay, or defraud creditors. But there is no evidence in the present case of any fraudulent intent on the part of Cushman, and the Bankruptcy Judge did not so find.[8]

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[8] Although unnecessary, in view of the Court's conclusion that Seaboard had no such control over Cushman as to dispense with any consideration of Cushman's intent, the Court deems it appropriate to note that the record provides questionable support for the Bankruptcy Judge's finding that Seaboard had an actual intent to hinder, delay, or defraud creditors. The Bankruptcy Judge relied upon five factors as the basis for this finding: (1) the transfers occurred while Cushman was insolvent and (2) at a time when bankruptcy proceedings could be reasonably anticipated; (3) Seaboard deceived Union Mutual into giving its consent to the second mortgages; (4) Seaboard used Bakers as its nominee for the transaction; and (5) Seaboard refused to disclose the true facts of the transaction until compelled by court order. With respect to the first two of these factors, the Bankruptcy Judge made no finding that Cushman was insolvent *at the time of the transfers*, which occurred more than five months before the initiation of the Chapter XI proceedings. Moreover, while proof of solvency at the time of a transaction is inconclusive where the issue is one of fraudulent intent, existence of insolvency at the time of the challenged transfer does not necessarily prove the intent requisite under Section 67d (2)(d). *See* 4 Collier ¶ 67.37[1] at 531-32. With respect to the third factor, the suggestion that Union Mutual was deceived into giving its consent to the second mortgages is refuted by the agreement of February 12, 1968, by which Union Mutual gave its consent, to which were attached copies of the second mortgages and the Flour Purchase Agreement. With respect to the fourth factor, as this Court has already observed, the use of a nominee for security transactions does not in and of itself connote fraud. Moreover, the only evidence as to Seaboard's purpose in utilizing Bakers as its nominee was so that other bakers would not know that Seaboard was financing one of their competitors and other flour suppliers would not know that Seaboard had loaned money to Cushman, both legitimate business purposes. The record is devoid of direct evidence of any intent by Seaboard to delay, defeat, or defraud Cushman's creditors. Finally, with respect to the fifth factor, any failure of Seaboard's counsel to disclose its relationship with Bakers during the course of the bankruptcy proceedings provides no basis for inferring an actual intent to defraud two years previously when the transfers were effected.

* * * * * * *

The Court holds that the Bankruptcy Judge erred in invalidating Bakers' secured claim on the grounds that the security interests were not perfected and that the security transactions were fraudulent.

III

The Disallowance of Bakers' and Seaboard's Claims

Statute of Limitations. Having determined that Bakers' claim of $65,500 was unsecured, the Bankruptcy Judge further disallowed both that claim and Seaboard's unsecured claim of $42,756.99 pursuant to Section 57g of the Bankruptcy Act, unless voidable preferences in the amount of $108,940.02 were surrendered. In so ruling, he held that the Trustee's Section 57g objections were not barred by the two-year statute of limitations contained in Section 11e of the Act, and that the payments received by Bakers on Cushman's $75,000 note during the four-month period preceding the filing of the Chapter XI proceedings and the amounts paid by Cushman to Seaboard for flour shipments during the four-month period constituted voidable preferences. Since this Court has held that Bakers has a valid secured claim, the payments on account of the note received by Bakers did not constitute voidable preferences, which would provide the basis for a Section 57g objection. 3 Collier ¶ 60.22. The Court further disagrees with the Bankruptcy Judge's conclusion that the Trustee's Section 57g objection to Seaboard's unsecured claim was not barred by the statute of limitations. In light of this, it is unnecessary for the Court to pass on the correctness of the Bankruptcy Judge's conclusion that the payments made by Cushman to Seaboard for flour shipments during the four-month period prior to bankruptcy were voidable preferences not protected by the so-called "net result rule." *See Jaquith v. Alden*, 189 U.S. 78, 83 (1903); *Yaple v. Dahl-Millikan Grocery Co.*, 193 U.S. 526 (1904). *Compare Campanella v.*

Liebowitz, 103 F.2d 252 (3rd Cir. 1939), *Cooper Petroleum Co. v. Hart*, 379 F.2d 777, 780-82 (5th Cir. 1967), and *In re Ira Haupt*, 304 F. Supp. 917, 944-45 (S.D.N.Y. 1969), *with Farmers Bank of Clinton, Missouri v. Julian*, 383 F.2d 314, 326-28 (8th Cir. 1967), and *In re Stewart*, 233 F. Supp. 89 (D. Ore. 1964). *See* 3 Collier ¶ 60.23.

The Cushman corporations were adjudicated bankrupt on June 2, 1969. Seaboard's proof of claim was filed on September 29, 1969. It was not until August 18, 1971, more than two years after the adjudication of bankruptcy, that the Trustee for the first time filed his Section 57g objection to Seaboard's claim and Seaboard thereafter moved to dismiss this objection as barred by the Section 11e statute of limitations.

Section 57g of the Bankruptcy Act provides that the claims of creditors who have received preferences "void or voidable" under the Act shall not be allowed unless such preferences are surrendered.[9] Section 11e of the Act provides that a trustee in bankruptcy may "within two years subsequent to the date of adjudication . . . institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy."[10] Applying this section, the Supreme Court in *Herget v. Central National Bank & Trust Co.*, 324 U.S. 4 (1945), held that the two-year statute of limitations contained in Section 11e barred an action brought by the trus-

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[9] Section 57g of the Bankruptcy Act provides:

> The claim of creditors who have received or acquired preferences, liens, conveyances, transfers, assignments or encumbrances, void or voidable under this Act, shall not be allowed unless such creditors shall surrender such preferences, liens, conveyances, transfers, assignments, or encumbrances.

[10] Section 11e of the Bankruptcy Act, in relevant part, provides:

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. . . .

tee to void a preferential transfer under Section 60b of the Act. In so holding, the Supreme Court made clear that since the Bankruptcy Act creates both the right of the trustee to set aside and recover voidable preferences and the correlative liability of creditors to surrender such preferences, and since the Act also fixes the limitation of time within which the trustee may enforce this federally-created right and liability, the trustee is bound to institute any such enforcement proceeding within the two-year period prescribed by Section 11e. *Id.* at 8-9. Subsequent to *Herget*, the lower federal courts have consistently applied the Section 11e statute of limitations to bar a variety of actions created by the Bankruptcy Act, including a Section 57g objection to the allowance of a claim, *In re Ira Haupt Co.*, 390 F.2d 251 (2d Cir.), *cert. denied*, 391 U.S. 916 (1968)[11]; actions to set aside a voidable preference under Section 60b of the Act, *Clouser v. Harrisburg National Bank and Trust Co.*, 219 F. Supp. 38, 40 (M.D. Pa. 1963); *Stark v. Baltimore Soda Fountain Mfg. Co.*, 101 F. Supp. 842 (D. Md. 1952); actions to void a lien under Section 67a of the Act, *Samuels v. Kockos Bros. Ltd.*, 307 F.2d 147, 149 (9th Cir. 1962), and actions to set aside a fraudulent transfer under Section 67d(3) of the Act, *Wells v. Place*, 92 F. Supp. 477 (N.D. Ohio 1950).

In the present case, the date of the adjudication was June 2, 1969 and the Section 57g objection to Seaboard's claim was not filed by the Trustee until August 18, 1971, over two years subsequent to the adjudication. More than two years having elapsed since the date of adjudication, *Herget* establishes that action by the Trustee to set aside and recover any preferential transfer by Cushman was barred by Section 11e. The Trustee's cause of action had expired, and any preferential transfer was, therefore, no longer "void or voidable" as required for the application of Section 57g. Since Congress set a two-year limitation for enforcing the federally-created right of the trustee to void a preferen-

[11] In In re Ira Haupt Co., the court accepted, without question, the agreement of the parties that Section 11e was applicable to a Section 57g objection. 390 F.2d at 253. This Court's attention has not been directed to any other case in which the applicability of Section 11e to bar a Section 57g objection has been considered.

tial transfer, any liability of Seaboard arising from the receipt of a voidable preference terminated two years after the adjudication of bankruptcy. As the Supreme Court noted in *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1945), "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive."[12]

The Court holds that the Trustee's Section 57g objection was not timely made and was barred by the two-year statute of limitations contained in Section 11e of the Act.

IV

Order

The order of the Bankruptcy Judge declaring invalid the secured claim of Bakers Management Corporation in the amount of $65,500, and further disallowing pursuant to Section 57g of the Bankruptcy Act that claim and the unsecured claim of Seaboard Allied Milling Corporation in the amount of $42,756.99, unless voidable preferences in the amount of $108,940.02 are surrendered, is reversed, and the matter is remanded to the Bankruptcy Judge for further proceedings not inconsistent herewith.

IT IS SO ORDERED.

Dated at Portland, Maine, this 27th day of February 1975.

[s] Edward T. Gignoux

United States District Judge

[12] The Bankruptcy Judge's reliance on Section 57f of the Bankruptcy Act, 11 U.S.C. § 93(f), as governing the time for filing objections under Section 57g is misplaced. Section 57f provided, prior to 1973:

> Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estate and the claimants will permit.

It is clear that Section 57f did not create any substantive or procedural

right in the trustee and that it was merely a rule of construction designed to encourage the expeditious administration of bankruptcy estates. 3 Collier ¶ 57.17[1]. It is significant that Section 57f was not carried over into the Bankruptcy Rules of 1973, for the reason that it was considered unnecessary in light of the more generalized statement contained in Bankruptcy Rule 903, which provides:

> These rules shall be construed to secure the expeditious and economical administration of every bankrupt estate and the just, speedy, and inexpensive determination of every proceeding in bankruptcy.

See Advisory Committee Note to Bankruptcy Rule 306.

Appendix C.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MAINE
SOUTHERN DIVISION

In the Matter of	:	
		In Bankruptcy
Cushman Bakery and	:	Nos. BK-68-786/787
Cushman Baking Company	:	Consolidated
Bankrupts		

Opinion and Order

I. *Introduction.*

The secured status and allowability of two claims totaling $108,000 are contested by the trustee in bankruptcy. One claim, now admittedly unsecured, was filed by Seaboard Allied Milling Corporation for $42,756.99 and the other by an affiliated organization known as Bakers Management Corporation, as a secured creditor for $65,500.00. Two basic questions are before the court for decision. In general, the court must first decide whether Bakers Management has a valid secured claim. If this claim is determined to be unsecured, then a decision must be made as to whether both claims should be disallowed pursuant to the provisions of § 57(g), unless voidable preferences in the amount of $109,000 are surrendered.

A review of the evidence convinces this court that Bakers Management's secured claim is invalid and, further, both claims must be disallowed, essentially because of the *secretive* way in which these two creditors arranged for a transfer of assets to secure the payment of antecedent and future indebtedness from an *insolvent* corporation.

II. *Procedural History.*

Cushman Baking Company and Cushman Bakery, (hereinafter sometimes referred to collectively as Cushman), originally filed separate petitions for an arrangement under Chapter XI on August 13, 1968. Seaboard and Bakers Management were listed as creditors only in the schedules filed by Cushman Baking Company. Schedule A-2 reflects "Seaboard Allied-Baker's Management Corp." as a secured creditor in the amount of $66,666.68. Rodney Milling Company, a trade name occasionally used by Seaboard, was listed in schedule A-3, as an unsecured creditor in the amount of $42,756.44. The Cushman corporations were adjudicated bankrupt on June 2, 1969 after it became apparent that a plan could not be proposed.

No documentation or other evidence was submitted by Seaboard and Bakers Management for the purpose of proving their claims until shortly after the bankruptcy adjudication. On September 29, 1969, Bakers filed a petition and a proof of claim to establish a lien in the amount of $65,561.51, together with interest at the rate of 7½% per annum from July 16, 1968, based upon a note of $75,000 and second mortgages on real and personal property given by Cushman Baking Company to Bakers Management on February 12 and 16, 1968. Also on September 29, 1969, Seaboard filed a petition and a proof of claim to establish a lien in the amount of $42,756.99, based upon a "Flour Purchase Agreement" and an assignment from Bakers Management of the note and second mortgages given by Cushman Baking Company. The same security documents were designed to secure both creditors. Seaboard, however, eventually conceded at a preliminary hearing that it was an unsecured creditor since Bakers Management had not made the assignment as originally contemplated.

Seaboard and Bakers Management were thereafter ordered by this court to prove their secured claim at a hearing scheduled for November 28, 1969. A full evidentiary presentation, however, was not completed until July 1972. The delay was due to a number of complicated circumstances which will be explained in more detail later when specific issues are considered. In summary, the November 28, 1969 hearing was continued to permit negotiations for a settlement of the controversy. When this failed, sometime in the mid-summer of 1970, the trustee filed formal objections, alleging that the security transactions were not properly authorized by Cushman's board of directors and, further, were a fraud on creditors because they constituted secret liens. A hearing on these objections, conducted on November 19, 1970, was largely confined to the technical ground of lack of authorization. In any event, no decision was reached since the court decided it should await the outcome of other litigation which could have rendered the controversy moot.

On June 16, 1971, after it became apparent that the pending controversy had to be resolved, the court advised all interested parties by letter that further evidence was necessary before a final decision could be reached. In this respect, the court noted that "[t]he sketchy outline of the facts as presented [at the November 19, 1970 hearing] indicate that there are bona fide questions relative to a fraudulent transfer, a voidable preference, an objection under § 57(g) and subordination (even if the claim were allowed as unsecured) that should be more fully explored. In view of these questions, the claim filed by Seaboard Allied Milling Corporation must also be reviewed."

As a result, the trustee initiated discovery procedures and eventually on August 18, 1971, amended his objections, outlining in greater detail the reasons why the security transfers to Bakers Management were fraudulent. Also, on that date, an objection was filed to Seaboard's unsecured claim on the basis it should be disallowed pursuant to the provisions of § 57(g) unless Seaboard surrendered voidable preferences of around $102,000.00. On September 24, 1971, Seaboard countered by moving to dismiss this objection on the ground that it was filed beyond the two-year period permitted for taking such action. Later, on January 7, 1972, the trustee filed an identical objection to the claim filed by Bakers Management, asserting it should be disallowed unless voidable preferences of around $7,000 were surrendered. The motion to dismiss was denied and a hearing on the objections was scheduled for February 3, 1972.

The final delaying circumstance was precipitated by Seaboard

and Bakers Management when they filed motions for the court's disqualification. These motions were also denied and finally a hearing on the merits was conducted on June 6, 7 and July 12, 1972.

III. *Facts.*

a. *Debtor-creditor relationship between Cushman and Seaboard.*

Three interrelated Cushman corporations operated bakeries for many years in Portland, Maine, and Lynn, Massachusetts, with their products being sold principally through house-to-house routes located in northern New England. Mr. Charles Carolan was president of these corporations since 1962. Cushman Baking Company operated the Portland plant and Cushman Bakery the Lynn plant until its closing in 1967. Thereafter, Cushman Bakery merely sold products purchased from Cushman Baking Company. Cushman Company, the third corporation, had no operational function but owned all of the stock of Cushman Bakery. It had essentially no separate assets but listed around $472,000 as debts incurred in 1962 when the Cushman Bakery stock was acquired. As part of the same transaction, the unpaid balance due for the stock redeemed by Cushman Baking Company amounted to around $400,000.00. In view of these circumstances, all three corporations may be considered as an integral unit for the purpose of assessing their financial condition.

Seaboard Allied Milling Corporation had supplied flour to the Cushman corporations for a period of some 30 or 40 years. Mr. Harry Bresky and his brother Otto are officers, directors, and substantial stockholders of this company. Harry Bresky, as president, is responsible for the financial affairs and thus, as he acknowledged, fully comprehends financial reports. In the past 10 or 12 years, Harry Bresky also was in charge of liquidating the assets of Hathaway Bakery, a company which sold its products through house-to-house routes much like Cushman. Otto Bresky,

who is primarily involved in sales, had serviced the Cushman account for the last 10 or 15 years.

Flour purchased from Seaboard had always been shipped and billed under the trade name of Rodney Milling Company on an open account basis, payable 30 days after delivery. Shipments totaled $96,510.00 in 1965; $219,320.00 in 1966; and, $164,324.65 in 1967, with each shipment costing around $6,500.00. The account was substantially current until the middle of 1967 but by October 3rd, Cushman was running as much as 90 days in arrears. It had not paid for the last five shipments and, therefore, then owed $31,624.65.

No further shipments were made by Seaboard for the remainder of that year, even though Cushman contracted to buy around $60,000 of flour on November 24, 1967, with delivery to be made over a period of 120 days. The first shipment was not made under this contract until January 18, 1968, after Seaboard had informally arranged a method by which Cushman could liquidate its past indebtedness and assure payment of future shipments. Thereafter, until March 6, 1972, when this arrangement was formally executed, Seaboard shipped but did not receive payment for seven carloads costing $42,327.02.

b. *Negotiations leading to security transfers.*

Steps for arranging such payments began sometime during the fall of 1967 when Otto Bresky realized that Cushman's indebtedness had increased substantially over the last five or six months. He first reviewed this situation with his brother Harry and then conferred with Mr. Carolan sometime early in November, in the course of one of his regular visits to Portland. In essence, Mr. Carolan attributed the financial problems to the closing of the Lynn plant and the ensuing loss of sales, explaining that the company was, therefore, unable to make payments on past indebtedness because "working capital was tight." After receiving a report from his brother about the situation, Harry Bresky decided he should also personally confer with Mr. Carolan in Portland.

Harry and his brother Otto came to Portland in late Novem-

ber or early December, 1967. By that time, Harry Bresky had learned from a study of a Dun & Bradstreet report that Cushman's fixed assets were subject only to a first mortgage held by the Union Mutual Life Insurance Company of Portland, Maine, to secure an unpaid balance then due of around $620,000.00. According to Cushman's records these assets were valued at $2.7 million. Harry Bresky confirmed that the value of these assets substantially exceeded Union Mutual's secured indebtedness by making a personal inspection of Cushman's plant and equipment.

Also, during this visit, Mr. Carolan again explained to the Breskys that the financial problems stemmed from the closing of the Lynn plant earlier that year and the attempt to convert from a house-to-house to a wholesale business. Harry Bresky testified he did not demand payment of the $31,000 debt at this meeting because Mr. Carolan acknowledged that Cushman "was strapped for cash." He did, however, think of loaning Cushman around $100,000 for working capital, an amount of money which Mr. Carolan thought would be sufficient to restore the company's financial stability. Of this amount, $75,000 would be in cash and the balance as credit for purchasing flour.

Mr. Carolan met with Harry and Otto Bresky again in their offices in Newton, Massachusetts, sometime in late December or early January, 1968. In the meantime, Harry Bresky had received a copy of Union Mutual's mortgage and Cushman's latest combined financial report, consisting of a balance sheet for 1965 and 1966 and, also, a statement of earnings for those two years. In addition, Mr. Carolan informed him about "everything" concerning Cushman's financial condition and particularly cautioned that the book values of the assets were too high. Harry Bresky, in his testimony, acknowledged that the value of the assets must be known in order to make a sound financial evaluation since there could be a wide discrepancy from the book values, as he had learned from his experience in liquidating the Hathaway Bakery. He, nevertheless, disregarded such details, testifying he concentrated primarily on Cushman's stated combined net worth of $912,000 for concluding it was safe for him to make the $75,000 loan.

As summarized by Harry Bresky, an agreement in principle was reached at this second meeting by which Seaboard would loan Cushman $75,000 for working capital, to be secured by a second mortgage on the real and personal property located in Portland and an assignment of a second mortgage on the real property located in Lynn. Seaboard was to supply the money for this loan but it was to be granted in the name of an affiliated organization known as Bakers Management Corporation, as nominee for Seaboard. In addition, Seaboard was to give Cushman 30 days credit in the amount of $25,000 for purchasing flour. In this connection, Cushman agreed to purchase a minimum of 50,000 cwt. from Seaboard annually, so long as any part of the $75,000 loan remained unpaid. This was nearly double the average quantity purchased from Seaboard over the last three years. As will be explained in more detail later, it was contemplated that any future indebtedness incurred in connection with the purchase of flour was to be secured by the same mortgages given as security for the $75,000 loan, by virtue of an assignment of the security documents from Bakers Management to Seaboard.

c. *Bakers Management employed as an instrument of concealment.*

Bakers Management was organized exclusively for the purpose of serving as Seaboard's functionary in connection with financing bakers to whom it sells flour. It does not perform any operational function other than being employed as a vehicle or conduit and thus does not derive any income or incur any loss. The stock of this company is wholly owned by Bresky Associates, a family partnership comprised of Harry and Otto Bresky and their sister. Its office is located at Slater, Goldman, Gillerman & Shack, 89 State Street, Boston, Massachusetts, the law firm which represents Seaboard. Charles Goldman and Julius Shack, both attorneys in this firm, are Bakers Management's only officers.

In this instance, Bakers Management was designated as the lender concededly for the purpose of concealing Seaboard's

identity as the real secured party. According to Harry Bresky, this was necessary to prevent other *bakers*, some of whom may have been customers, from knowing that Seaboard was financing one of their competitors. In contrast, Otto Bresky originally testified at a § 21(a) hearing that the purpose of this arrangement was to prevent other *flour suppliers* from knowing that Seaboard had loaned money to Cushman. In his view, if such information were known, Cushman would "lose some of his ability to buy flour at competitive prices" from others. However, Otto Bresky changed his testimony at the last hearing by concurring with his brother as to the reason for this designation, explaining that he had first considered the transaction solely from a *sales* point of view but changed his mind after his brother explained the *financing* aspect of the transaction.

d. *Description of documentation.*

Julius Shack, as attorney for Seaboard, was directed on January 4, 1968 to prepare the necessary loan and security documents regarding the agreement reached between the Breskys and Carolan. Some documents were prepared by the attorney representing Cushman. In summary, the documents reflect that Union Mutual Life Insurance Company agreed that Cushman could give a second mortgage on its real and personal property located in Portland and Lynn to secure the payment of a $75,000 loan and future purchases of flour pursuant to the terms of a flour purchase agreement. This permission was based upon a representation that Cushman was to receive $75,000 as "working capital." The second document is a note dated February 16, 1968 for $75,000 payable in monthly installments over a period of three years with an interest rate of 7½% annually, given by Cushman Baking Company to Bakers Management (as nominee for Seaboard.) This note was to be secured by three separate documents: (i) a second mortgage on Cushman's personal property in Portland dated February 12, 1968; (ii) a second real estate mortgage on its Portland property dated February 16, 1968; and, (iii) an assignment of a second mortgage on Cushman Bakery's real property located in Lynn, Massachusetts, held by Cushman Baking Company as security for an intercompany indebtedness of $100,000.00.

As indicated previously, these mortgages were also to be given as security for all future indebtedness owed by Cushman to Seaboard principally for the purchase of flour. In this respect, the second mortgage on the Portland real property provides:

> "This mortgage is given to secure the *note* hereinafter described and also to secure all other liabilities of the mortgagor to the holder of said note, whether now existing or hereafter arising, *including*, without limitation any *and all liabilities for the purchase of flour* or other merchandise by the mortgagor *from the holder of said note* pursuant to an agreement of even date herewith." (Emphasis supplied).

Similar language is contained in the personal property security document.

Although in no way identified in these documents, the "holder" was to have been Seaboard since the Breskys contemplated as part of the arrangement, that Bakers Management was to have assigned the $75,000 note and security agreements to Seaboard. No one, however, was aware that the assignment had not been executed until sometime after Seaboard and Bakers Management had filed their secured claims with the court in September of 1969. Because of this failure, Seaboard conceded at the November 28, 1969 hearing that its claim for $42,756.99 is unsecured.

The drafting of the necessary documents was completed by the first of March. By this time Cushman had received the five carloads shipped in January and, thus, the unpaid indebtedness due Seaboard had increased from $31,624.65 to $61,873.45. In addition, Cushman was to have received two February shipments costing $12,078.22 but these were stopped in transit by an order issued by Seaboard on March 4, 1968.

e. *Purported loan a transfer to secure antecedent debt due Seaboard.*

On the following day, March 5th, Harry Bresky directed

Julius Shack to close the transaction and also instructed him to collect for the 10 unpaid shipments totaling $61,873.45. Mr. Shack arranged for such a closing to take place in Portland on March 6th. At this closing, Mr. Shack delivered Bakers Management's check of $75,000, money which it had received earlier from Seaboard. According to Mr. Shack, he demanded immediate payment of the current indebtedness but, instead, Cushman handed Mr. Shack a check for $73,961.67, prepaying $12,078.22 in order to obtain a release of the two February shipments which had been stopped. In turn, Seaboard credited Cushman's account by this amount and, thereby, the outstanding indebtedness was fully repaid. As a result of this transaction, however, Cushman received merely $1,000 in cash but still owed $75,000 to Seaboard, even though the note was made payable to Bakers Management, because the court considers the transfer solely as an attempt to secure the antecedent indebtedness rather than being an extension of new credit.

f. *Recording of documents.*

The second real estate mortgage on the Portland real property was recorded in the Cumberland County Registry of Deeds on March 6, 1968. The only parties identified in this document are Cushman Baking Company as the mortgagor and Bakers Management Corporation as the mortgagee. As noted previously, Seaboard is nowhere specifically identified. Two financing statements were filed to perfect the second security interest in the Portland personal property. One was filed in the Cumberland County Registry of Deeds and the other with the Secretary of State of Maine, both on March 8, 1968. These financing statements describe Cushman Baking Company as the debtor and Bakers Management Corporation as the secured party. The box for designating the assignee of the secured party is blank. The financing statement recorded in the registry of deeds was signed by C. T. Carolan as treasurer of Cushman Baking Company and by Julius L. Shack as attorney for Bakers Management Corporation. No evidence was introduced as to whether or how the financing statement filed with the Secretary of State was signed.

g. *Payments by Cushman during four-month period.*

Cushman paid four of the monthly installments due on the $75,000 note, each in the amount of $2,333, before the Chapter XI proceedings were initiated. The first payment was sent directly to Seaboard on April 1, 1968, which it retained. The remaining three installments totaling $6,999 were paid during the four-month period directly to Bakers Management. These payments, however, were immediately remitted by that organization to Seaboard. Accordingly, on August 13, 1968, the date the Chapter XI proceedings were filed, $65,561.51 remained unpaid on the note for principal and interest.

From March 7 to August 13, 1968, the date of the Chapter XI proceedings, Cushman purchased between $25,000 and $30,000 worth of flour monthly from Seaboard in compliance with the Flour Purchase Agreement. Cushman remained substantially current on this account for the first three or four months but, by late July, was $30,000 in arrears. In view of this situation, Seaboard stopped two shipments totaling $9,619.70 which were released when full payment was received for them on July 31, 1968. All told, during the four-month period preceding the filing of the Chapter XI proceedings, Cushman paid Seaboard $101,941.02 for shipments totaling $144,698.01. As a result, Seaboard was then owed $42,756.99, the exact amount of the claim as filed with this court, originally alleged to be secured.

In summary, therefore, Seaboard received $108,940.02 from Cushman during the four-month period and filed two claims totaling $108,318.50. In other words, during this period, Seaboard received about half of what it was owed.

h. *Insolvency.*

A very careful review of the evidence convinces this court that Cushman Baking Co. and Cushman Bakery were individually and collectively insolvent, within the meaning of § 60a, at all times during the four-month period prior to the filing of proceedings under the Bankruptcy Act on August 13, 1968. If the

debts of Cushman Company were also included the deficit would be substantially increased. As noted earlier, the court believes that all three corporations should be considered as an integral unit for the purpose of assessing their financial condition.

The combined financial reports of these three corporations disclose that their net worth declined steadily since 1965, with the sharpest drop occurring in 1967. At the end of 1965, the stated net worth was $1,022,218 and in 1966 $912,455.00. During each of these two years, Cushman had net sales totaling around $12 million annually. However, in 1967, after the Lynn plant was closed, the combined net sales dropped to $9.9 million. As a result, Cushman suffered a net loss of $807,442 and the net worth consequently shrunk to $105,012.00. Losses continued in 1968 and by March 31, 1968, Cushman's records reflected a *negative* net worth of $40,146.00.

The size of the negative net worth increased thereafter even though an improvement in Cushman's financial condition would ordinarily have been expected due to the sharp increase in business that occurs during Maine's busy summer season. This adversity was due to continued losses rather than any significant reduction of assets during the four or five months immediately preceeding the Chapter XI proceedings. Accordingly, on August 13, 1968, when such proceedings were filed, Cushman Baking Company and Cushman Bakery's schedules listed combined assets totaling $2,011,692.03 and total liabilities of $2,351,738.02, indicating a deficit of around $340,000.00. The extent of their insolvency would be increased to around $793,000, if the negative net worth of the Cushman Company totaling about $453,000 was also included.

In concluding that Cushman was insolvent, the court analyzed the assets and debts of each company separately, considering them first as scheduled, then reviewed the forced and fair market values of the assets as determined by appraisals, and finally compared these various values as against the proceeds realized from liquidation. It should be noted that the only evidence as to values was submitted by the trustee, principally through Mr. Samuel Richard of Brookline, Massachusetts,

whose qualifications as an appraiser are exceptional.[1] It should also be observed that in making the fair market appraisals, Mr. Richard testified in part that he took ". . . into consideration the possibility of selling as a going business, if things are favorable in the setup of the plant."[2] In all instances, except one, the several comparisons reveal that each company was insolvent during the entire four-month period whether considered individually or collectively, as illustrated by the chart on pages 74 and 75.

The fact that the schedules reflected that Cushman Bakery was solvent should be disregarded. The fair market value test is a far more reliable basis for making that determination. Even that negative figure, however, is inflated because the accounts and notes receivable were valued at 60% of the face amount, when actually only 20% was realized through collections. It should also be noted that an intercompany debt of $992,409.20 owed by Cushman Bakery to Cushman Baking Co. was excluded, even though the trustee argued that such debt should be recognized since the corresponding account receivable was worthless. So, in this court's view, unquestionably these companies, either individually or collectively, were hopelessly insolvent at all times during the four-month period.

IV. *Transfers invalid as against trustee.*

a. *Lack of Perfection.*

In the context of this factual matrix, the court is thoroughly convinced that the security transactions were not properly perfected and, therefore, are invalid as against the trustee in bankruptcy, in his capacity as a hypothetical lien creditor, because

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[1] *See* statement of his qualifications *In re* Ouellette, 98 F. Supp. 941 (D. Me. 1951).

[2] Transcript at 364.

	CUSHMAN BAKING CO.			CUSHMAN BAKERY			
	Assets [3]	Debts	Net Worth	Assets [3]	Debts	Net Worth	Combined Net Worth
As Scheduled	1,381,819	1,874,958	-493,139	629,872	476,779	+153,093	-340,045
Forced Sale Value	1,127,008	"	-747,950	378,200	"	-98,578	-846,529
Fair Market Value	1,405,199	"	-469,759	469,935	"	-6,843	-476,602
Actual Liquidation	741,650	"	-1,133,308	309,093	"	-167,685	-1,300,994

[3] An itemized account of the assets used in compiling these totals is as follows:

I. CUSHMAN BAKING CO.

	Assets			
	Scheduled	Forced Sale Value	Fair Market Value	Actual Liquidation
Cash	1,245.46	1,245.46	1,245.46	56,451.50
Real Property	[913,130.00]	594,600.00	594,600.00	[553,500.00]
Equipment		333,466.50	500,199.75	
Inventory	179,302.00	80,000.00	107,250.00	31,795.19
Accts. Rec.	203,231.00	50,807.75(25%)*	121,938.60(60%)**	[31,888.16]
Notes Rec.	37,363.74	9,340.94(25%)*	22,418.24(60%)**	
Insurance	3,670.00	3,670.00	3,670.00	49,015.87
Deposits	43,877.43	43,877.43	43,877.43	-0-
ADC Stock	-0-	10,000.00	10,000.00	10,000.00
Misc.	-0-	-0-	-0-	9,000.00
TOTALS	1,381,819.63	1,127,008.08	1,405,199.48	741,650.72

II. CUSHMAN BAKERY

Cash	560.00	560.00	560.00	-0-
Real Property	412,000.00	252,000.00	287,000.00	275,859.87
Equipment	25,300.00	26,650.00	39,975.00	869.13
Inventory	-0-	-0-	-0-	-0-
Accts. Rec.	115,061.86	28,765.47(25%)	69,037.12(60%)	[25,118.16]
Notes Rec.	8,966.81	2,241.70(25%)	5,380.09(60%)	
Insurance	7,246.00	7,246.00	7,246.00	7,246.00
Deposits	60,737.73	60,737.73	60,737.73	-0-
ADC Stock	-0-	-0-	-0-	-0-
Misc.	-0-	-0-	-0-	-0-
TOTALS	629,872.40	378,200.90	469,935.94	309,093.16

*Estimated by court in view of the [na]ture of the accounts and the amounts actually realized.
**Based on Mr. Harry Bresky's testimony.

the concealment of the identity of the real secured party was designed, or inevitably had the effect, of misleading third persons to their detriment.

Maine's statutory law requires that real and personal property security transactions must be properly recorded in order to be effective as against third persons. A properly executed and acknowledged deed or other original instrument evidencing a real estate mortgage must be recorded and cross-indexed under the names of both the mortgagee and mortgagor. 33 M.R.S.A. §§ 151, 201, 203 & 651. In contrast, only a summary of the basic information need be provided relative to personal property security transactions, as permitted under the concept of "notice filing." 11 M.R.S.A. §§ 9-301, 9-302 & 9-402. A financing statement must be filed which discloses merely the names, signatures and addresses of the secured party and debtor and also indicates the type of collateral covered. 11 M.R.S.A. § 9-402(1).[4] More particular information may be obtained from the parties by complying with the discovery procedures provided by § 9-208.[5]

Recording acts perform a dual function. They were designed to prevent fraud and also to assure full disclosure to third persons of the key elements of any transfer. *See* 1 Glenn, *Fraudulent Conveyances* § 364a (rev. ed. 1940); 76 C.J.S. *Records*

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[4] In part this subsection provides:
A financing statement is sufficient, if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral.

[5] In part this section provides:
(1) A debtor may sign a statement indicating what he believes to be the aggregate amount of unpaid indebtedness as of a specified date and may send it to the secured party with a request that the statement be approved or corrected and returned to the debtor. . . .

(2) The secured party must comply with such a request within 2 weeks after receipt by sending a written correction or approval. . . .

§§ 1 & 2 (1957); Coogan, Hogan & Vaghts, 1 *Secured Transactions*, Bender's UCC Serv. § 6.01 (1972 ed.). To afford a reasonable assurance to those who deal on the faith of such instruments that they are genuine and represent *bona fide* transactions, public policy "favors an interpretation and construction which will encourage confidence in records rather than suspicion, doubt, or uncertainty." 76 C.J.S. *Records* § 2 at 114 (1952); *see also Safe Deposit Bank and Trust Co. v. Berman*, 393 F.2d 401 (1st Cir. 1968). Thus, the recorded document must not only provide exactly what the governing statute requires, but the information must be reasonably accurate so that a third person, once alerted that a prior security interest exists, may discover the true nature of the transaction by further inquiry from either the debtor or the secured party or both without undue difficulty. *See Silver v. Gulf City Body & Trailer Works*, 432 F.2d 992 (5th Cir. 1970); *In re* Grandmont, 310 F. Supp. 968 (D. Conn. 1970); Coogan, Hogan & Vaghts, 1 *Secured Transactions* Bender's UCC Serv. § 6.04 [2] (1972 ed.). Hence, the identity of the real parties to the security transaction is one of the more indispensable requirements of any recording system. *See* 66 Am. Jur. 2d *Records and Recording Laws* §§ 94, 139-142 (1973); 59 C.J.S. *Mortgages* § 107 (1949).

Substantial compliance with this requirement is sufficient provided the misdescription of the parties is not seriously misleading. This standard, historically followed relative to secured transactions involving real property,[6] has now been codified as part of our commercial law governing personal property security transactions. 11 M.R.S.A. § 9-402(5).[7]

Applying this functional test, several courts have invalidated security transactions because exceedingly minor errors in iden-

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[6] *See e.g.* McCausland v. York, 133 Me. 115, 174 A. 384 (1934).

[7] This subsection provides:
A financing statement substantially complying with the requirements of this section is effective, even though it contains minor errors which are not seriously misleading.

tifying the parties were considered as being seriously misleading.[8] In other instances, where minor errors were disregarded, the courts found substantial compliance where the financing statement provided "sufficient additional information to enable a prudent examiner to ascertain the exact state of affairs through further inquiry." *In re* Colorado Mercantile Co., 299 F. Supp. 55 at 58 (D. Col. 1969).[9] Quite clearly, irrespective of these possibly conflicting views, something close to letter-perfect precision is required by many respected courts whenever it appears that a third person would be thwarted or unduly inconvenienced in searching public records because of how the parties are identified.

In these circumstances, lack of perfection would seem to follow as a matter of course where the identity of the real se-

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[8] Most of the reported decisions involve a misdescription of the debtor. *In re* Raymond F. Sargent, Inc., 8 UCC Rep. Serv. 583 (D. Me. 1970) [Raymond F. Sargent *Co.*, Inc. for Raymond F. Sargent Inc.]; *In re* Brawn, 6 UCC Rep. Serv. 1031 (D. Me. 1969) [Brown for Brawn]; Bank of North America v. Bank of Nutley, 94 N. J. Super. 220, 227 A.2d 535 (1967) [Kaplas for Kaplan]; National Cash Register Co. v. Valley National Bank of Long Island, 5 UCC Rep. Serv. 396 (N.Y. Sup. Ct. 1968) [Boywald for Borgwald]; John Deere Co. v. William C. Pahl Const. Co., 59 Misc. 2d 872, 300 N.Y.S. 2d 701 (1969) [Ranelli for Ranalli]; *In re* Thomas 466 F.2d 51 (9th Cir. 1972) [West Coast Avionics for Burris Haley Thomas].

Perhaps the greatest incidence of cases involving a misdescription of the debtor is due to the facility in demonstrating an inability to learn about the existence of a security transaction where the financing statement has not been properly indexed under the debtor's name as required by 11 M.R.S.A. § 9-403(4). But, there are cases dealing with the description of the secured party which have adopted an equally strict standard *e.g.*, an omission or less than a complete address of even a correctly named secured party has been held to be fatal error. Strevell-Paterson Finance Co. v. May, 77 N.M. 331, 422 P.2d 366 (1967); Burlington National Bank v. Strauss, 50 Wis. 2d 270, 184 N.W. 2d 122 (1971).

[9] Several other cases reflect a lenient attitude regarding what is required relative to the description of the debtor and the secured party.

a. For cases where the misdescription of the debtor has been disregarded *see e.g. In re* Excel Stores, Inc., 341 F.2d 961 (2nd Cir. 1965) [Excel

cured party is concealed by using an entirely different name as the secured party of record for the purpose of deliberately misleading third persons. Such an insidious abuse of the recording system is equivalent to the prior illegal practice of retaining a secret lien by withholding documents from public record. *See* 1 Glenn, *Fraudulent Conveyances*, §§ 306, 370 (1940 rev. ed.); 4A Collier on Bankruptcy ¶ 70.73 (14th ed. 1971). Perhaps the use of a different name is permissible provided no one is seriously misled. *See Johnson v. Wilson & Co.*, 137 Ala. 468, 34 So. 392 (1903); *First Nat. Bank of Bridgeport v. National Grain Corp.*, 131 A. 404 (Conn. 1925); *Richardson v. Stewart*, 247 N.W. 273 (Iowa 1933); *Blackman v. Henderson*, 116 Iowa 578, 87 N.W. 655 (1901). *See also Industrial Packaging Prod. Co. v.*

Department Stores for Excel Stores, Inc.]; National Cash Register Co. v. Firestone & Co., Inc. 346 Mass. 255, 191 N.E. 2d 471 (1963) [Cozy Kitchen for Kozy Kitchen]; *In re* Platt, 257 F. Supp. 478 (E.D. Pa. 1966) [Platt Fur Co. for Henry Platt].

b. A Liberal approach has also been followed regarding the identification of the secured party. *See e.g. In re* Colorado Mercantile Co., *supra* [O.M. Scott *Credit Corp.* for O.M. Scott *and Sons Company*]. An exact street address of the secured party is under certain circumstances not fatal. Silver v. Gulf City Body & Trailer Works, 432 F.2d 992 (5th Cir. 1970); *In re* Bengston, 3 UCC Rep. Serv. 283 (D. Conn. 1965). Even an omission of an address has been erroneously disregarded by two courts. Rooney v. Mason, 394 F.2d 250 (10th Cir. 1968); *In re* French, 317 F. Supp. 1226 (E.D. Tenn. 1970). *See* Willier & Hart, 6D *Reporter-Digest, Case Annotations*, Bender's UCC Serv. at 2-1964, 2-1964.16 for a criticism of these decisions.

Fort Pitt Pack. Int., 399 Pa. 643, 161 A.2d 19 (1960).[10] However, unless there is some indication in the recorded document (such as disclosure of the exact capacity of the designated party) that someone else is the real secured party, this is a very dangerous practice, especially if pursued when the debtor is in

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[10] In this case Fort Pitt Packaging International Inc., as the debtor, transferred all present and future accounts receivable to the Provident Trust Company of Pittsburgh as security for a loan. A properly executed financing statement was filed in two locations. About a year and a half later, Fort Pitt Packaging International Inc. contracted to perform certain services for the United States Government. It also, about this time, borrowed $140,000 from Empire Commercial Corporation. Although the Provident Trust Company had a senior security interest in any payments due under the government contract, this contract was assigned by agreement to Provident Trust Company as Empire's agent for the purpose of securing the $140,000 loan. It appears that this was an innocent arrangement undertaken for the purpose of avoiding the necessity of filing a second financing statement.

The Pennsylvania supreme court upheld this arrangement as against a receiver appointed in an insolvency proceeding initiated a year later. In reaching this decision, the court noted, "It makes no difference as far as such notice is concerned [to potential future creditors or purchasers] whether the secured party listed in the filing statement is a principal or an agent, and no provision in the Uniform Commercial Code draws such a distinction." *Id.* at 21.

Seaboard's reliance on this broad pronouncement is misplaced. 1. Fort Pitt assigned proceeds from the United States Government's contract to Empire as security for a bonafide loan of $140,000.00. It was not for the purpose of securing any antecedent indebtedness. 2. There is no indication in the decision that Fort Pitt was insolvent when this transfer occurred. 3. There is no indication that the Provident Trust Company was designated as Empire's agent for the purpose of concealment. Likewise, there is nothing to indicate that Provident Trust Company would not have disclosed the true nature of the transaction if any third party had inquired. 4. 11 M.R.S.A. § 9-302(2) specifically provides that the filing of an assignment is not required as a condition of continuing the perfected status of the security interest against creditors and transferees of the original debtor. Filing of an assignment is merely permissive as declared by 11 M.R.S.A. § 9-405(1), except in connection with a termination statement filed by the assignee. 11 M.R.S.A. § 9-404(1). In effect, by this arrangement, Provident Trust Company assigned its security interest in this government contract to Empire. A separate recording was, therefore, unnecessary.

serious financial difficulty, since there is nothing to suggest that a further inquiry is at all necessary. *See* 66 Am. Jur. 2d *Records and Recording Laws* §§ 99, 150 (1973).

A careful consideration of the potentially irreparable harm other creditors might have suffered convinces this court that the *use of a different name as the secured party of record should be absolutely barred during the critical period of insolvency.* No practice should be condoned which would hinder creditors in gathering crucial information during that sensitive period when financial news or other reports are closely scanned for the purpose of detecting an unusual transfer of assets. Further inquiry to discover the possibility of a voidable preference can be guaranteed only if the identity of the real secured party is fully disclosed in the recorded documents. Knowledge of the true facts would then enable other creditors to demand equal treatment or to initiate involuntary bankruptcy proceedings, so that any question about the transfer not occurring within the four-month period would be avoided.

To foreclose the possibility of such scrutiny, Seaboard camouflaged the security transactions by making it appear that an unrelated party was extending new credit as a fresh money transaction. It went further and concealed the fact that Seaboard would also be secured for any flour sold thereafter pursuant to the Flour Purchase Agreement. Surely, such double secrecy was devised to prevent anyone from suspecting that Seaboard was being extensively preferred, since there was nothing in the recorded documents suggesting that tracing may be required to discover the identity of another party. Other creditors conceivably not only lost an opportunity to prevent a diminution of assets but were also induced by this deception to continue extending unsecured credit to an insolvent corporation. It is exactly this false impression that Seaboard desired to convey, and indeed was partially successful, since none of Cushman's 500 trade creditors questioned the transfers before the four-month period expired.

But there is a more fundamental basis for invalidating these transfers, which applies irrespective of the debtor's financial plight, where there is less than full disclosure as to the identity

of the real secured party. As noted earlier, any person designated as a secured party has an implicit responsibility to disclose the true nature of the transaction to an inquiring third person. As part of proving perfection, therefore, it must be clearly demonstrated that *the secured party of record was always able and willing to disclose the identity of the real secured party involved.* Such disclosure would provide the information to which a third person is entitled and needs, if the recording system is to be an effective public tool.

A review of this record reveals that neither Bakers Management nor Seaboard was ever so disposed. In the first place, it was conceded that Bakers Management was used as a conduit to prevent competing bakers from learning about the purported loan. Even selective deception, however, would necessarily encompass other third persons, since effective concealment commands total secrecy. In fact, Seaboard expanded the category of persons it sought to deceive by also disguising the transfer to secure future indebtedness. Even more invidious, Seaboard persisted in its policy of secrecy throughout these court proceedings until discovery proceedings were initiated, after the court insisted that the facts surrounding the transfers be more fully explored.[11] Obviously, an unwillingness to disclose the real secured party can not be tolerated if the integrity of our recording systems is to be preserved and, therefore, imperfection must be decreed whenever deception of that nature is practiced.

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[11] Such action was prompted because, until then, Bakers Management's counsel was hardly forthright in explaining this relationship even though pressed by this court for such information at the November 28, 1969 hearing. The court, at that hearing, asked Mr. Julius Shack, "Is it true that Seaboard Allied and Bakers Management are related?" Mr. Shack replied: "No, there are no common officers, no common stockholders. The money, I can say from my own knowledge, did not come from Seaboard Allied." Mr. Shack's subsequent explanation of this answer serves only to confirm that the true nature of the relationship would not have been disclosed unless a series of extremely precise questions had been asked. Transcript of July 12, 1972 hearing at 335-339.

b. *Fraudulent Transfers.*

Indeed, Seaboard's secret arrangements constitute a classic example of transfers intended to hinder, delay, or defraud either existing or future creditors. *See In re* Allied Development Corp., 435 F.2d 372 (7th Cir. 1970). As authority for declaring the transfers fraudulent, the trustee can utilize § 67d(2)(d)[12] or the statute of 13 Eliz. c. 5 (1570)[13], an act which has been adopted in Maine as part of its common law. *Butler v. Moore,* 73 Me. 151 (1882). For the purpose of invalidating such transfers the trustee can employ the strong-arm provisions of § 70c or exercise the powers provided by § 70e(1). Section 70c is applicable because subsequent creditors in Maine may attach, levy upon, and sell fraudulently conveyed property upon execution. 14 M.R.S.A. 2014; *Fletcher v. Tuttle,* 97 Me 491, 54 A. 1110 (1903); *Michaud v. Michaud,* 129 Me. 282, 151 A. 559 (1930). Proof of the existence of an actual creditor in this instance would be unnecessary since the trustee, as a hypothetical lien creditor, could be deemed as having taken such action. *See Lewis v. Manufacturers Nat. Bank,* 364 U.S. 603 (1961). However, since it has been shown that Union Mutual had a provable claim as a partially secured creditor as of the date of the arrangement proceedings, the trustee can also invoke § 70e(1) for avoiding the transfers.

That Cushman may not have actually intended to hinder, delay, or defraud creditors is immaterial since Seaboard was in a

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[12] This subsection provides:

> Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent . . . (d) as to then existing and future creditors, if made or incurred with actual intent as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors.

[13] In essence, this statute likewise declares "utterly void" any transfer made with the "end purpose and intent, to delay, hinder or defraud creditors" on due proceedings initiated by creditors or by their representatives, such as assignees in bankruptcy. *See* Butler v. Moore, 73 Me. 151 (1882)

unique position to dominate or control the manner in which Cushman's property was disposed. Therefore, it suffices for determining that the transfers were fraudulent to demonstrate that only Seaboard had such requisite intent. *Langan v. First Trust & Deposit Co.*, 293 N.Y. 604, 59 N.E. 2d 424 (1944); 4 Collier ¶ 67.37[2]. And, in the light of all surrounding circumstances, Seaboard's ingenious scheme for concealing the true nature of the security transactions leads to the irresistible factual conclusion that it did. As a matter of fact, it is inconceivable that a court, guided by common commercial knowledge and practice, could conclude differently. *See* 4 Collier ¶ 67.37[3].

Seaboard's lack of good faith may be inferred from several badges or *indicia* of fraud. *See* 1 Moore on Fraudulent Conveyances c. VI, §§ 1-21 (1908); 1 Glenn, *Fraudulent Conveyances* §§ 305-307a (1940 rev. ed.); 59 C.J.S. *Mortgages* § 286 (1949); 4 Collier ¶ 67.37[3]. (1) These transfers occurred when Cushman was insolvent and (2) at a time when it could be reasonably anticipated or expected that proceedings under the Bankruptcy Act would be initiated shortly, as they did some five months later. (3) The security transactions were also marked by deception in gaining Union Mutual's consent relative to the second mortgages; (4) concealment of the true nature of the transactions by the use of a dummy corporation and by an assignment to an undisclosed party, which would not ordinarily be detected because of the close interrelationship between the two corporations; and, (5) secrecy by refusing to disclose the true facts until compelled by court order.

No doubt Seaboard could have properly acquired security for the antecedent and future indebtedness through a direct transaction between the debtor and creditor. But, as explained earlier, it realized that this would be too risky in view of Cushman's dire financial circumstances and, therefore, there was no alternative but to hide the true nature of the transaction if it wished to succeed. This is precisely what it did and, since existing and future creditors were hindered, defrauded or delayed, Seaboard must suffer the consequences prescribed by law.

It is unnecessary, in view of these conclusions, to consider

the trustee's contentions that the transfers should also be invalidated because they lacked corporate authority and were also fraudulent on the narrow ground that permission for such transfers was gained by deceiving Union Mutual. Other issues also need not be considered such as whether the transfers may be disregarded because as between Cushman and Bakers Management they lacked consideration except possibly for $1,000 or, whether the liens could be considered discharged (again except for $1,000) because the court, in the exercise of its equitable powers, could declare that Cushman's immediate repayment should have been credited to the debt due Bakers Management.

V. *Disallowance of Claims Pursuant to § 57(g) Since Voidable Preferences Received.*

a. *Trustee's objections filed timely.*

As noted earlier, the trustee expanded his line of attack against the Seaboard and Bakers Management claims by filing additional objections on August 18, 1971 and January 7, 1972, asserting that both claims should be disallowed pursuant to the provisions of § 57(g), on the basis that voidable preferences totaling $114,000 had been received.

A preliminary question concerns the timeliness of these objections. In its motion for dismissal filed on September 24, 1971,[14] Seaboard contends that the two-year limitation fixed

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[14] This motion related only to the objection to the claim filed by Seaboard. No motion for dismissal was filed or an affirmative defense asserted to the objection filed on January 7, 1972 against Bakers Management's claim. In essence, since Seaboard is really the creditor for both claims, nothing new was added by the second objection except increasing the amount allegedly received in violation of § 60. It, therefore, will be considered as an amendment relating back to the objection filed on August 18, 1971 for the purpose of resolving the question of timeliness. It is immaterial, for this reason, that Seaboard failed to respond separately to the second objection.

by § 11(e)[15] had expired before the trustee acted. If § 11(e) governs, the trustee should have objected before June 2, 1971, two years after the date of adjudication. *In re* Ira Haupt & Co., 390 F.2d 251 (2nd Cir. 1960). However, even though the objections were filed beyond that two-year period, technical as well as substantive reasons dictate that Seaboard's motion must be denied.

In the first place, Seaboard's motion was not filed within the time limitations fixed by the Federal Rules of Civil Procedure. *See* Rule 8(c) and Rule 12 (a) F.R.C.P. But denial need not rest on that narrow ground since basically the time for filing such objections is clearly governed by § 57(f)[16] rather than § 11(e). And no set time limitation is fixed by § 57(f). Indeed, by virtue of § 57(k), a claim can be reconsidered and reallowed or rejected at any time before "the estate has been closed."[17] Only the equitable doctrines of laches and estoppel qualify the broad period within which objections may be filed. 3 Collier ¶ 57.23[4].

The process sanctioned by §§ 57(f), (g) and (k) comports with the underlying concept that statutory limitations are imposed to bar actions seeking affirmative relief rather than suppress or deny any defenses that may be asserted. *See* 34 Am.

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[15] This section prescribes in part:
A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy.

[16] This section prescribes:
Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

[17] Section 57(k) states:
Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed.

Jur. *Limitation on Actions*, § 63 (1959); 54 C.J.S. *Limitations of Actions* § 285 (1948). In other words, a counterclaim, set-off, or recoupment may be asserted as a defensive measure even though an action arising out of the same transaction for affirmative recovery would have been barred. Beyond this, however, such defensive action is now specifically permitted by 14 M.R.S.A. § 865,[18] thus providing the trustee with additional authority for eliminating or reducing these claims. In this instance, therefore, where the trustee definitely does not directly or indirectly seek recovery of any money or other property from the creditors, the objections were timely even if affirmative recovery may have been barred by § 11(e).

Finally, even though it may appear that a long time elapsed before the trustee acted, there certainly is nothing in the record suggesting that the objections should be barred by laches or estoppel. Seaboard has not been prejudiced. If anything, the delay was directly attributable to Seaboard's deception which prevented the trustee from realizing until late 1970 or early 1971 that it had received large voidable preferences from Cushman. In this context, therefore, any statutory limitation would have been tolled until the true facts had been discovered or should have been discovered by diligent conduct. *See Holmberg v. Armbrecht*, 327 U.S. 392 (1945); 54 C.J.S. *Limitations of Actions* § 206 (1948); and, 34 Am. Jur. *Limitations of Actions* § 231 (1959). Once the secret arrangement was unraveled, the trustee acted quite promptly by filing his objections a few months thereafter. Hence, irrespective of which section governs, there is no basis for concluding that these objections are barred by any time restrictions.

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[18] This section provides:
APPLICATION OF LIMITATIONS TO COUNTERCLAIMS. All the provisions hereof respecting limitations apply to any counterclaim by the defendant except a counterclaim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim to the extent of the demand in the plaintiff's claim. The time of such limitation shall be computed as if an action had been commenced therefor at the time the plaintiff's action was commenced.

b. *Seaboard had Reasonable Cause to Believe Cushman was Insolvent.*

Turning to the merits, Seaboard concedes that all elements of § 60 have been established except 1. proof of the requisite insolvency, and, 2. that Seaboard had reasonable cause to believe that such insolvency existed when the transfers occurred. As a third defense, should the court decide against Seaboard on these two points, it contends that the amount of the new credit extended during the four-month period can be set off against the amount of the voidable preferences, as authorized by either the "net result rule" or § 60c.

The court has already concluded that Cushman was insolvent at all times during the four-month period. No further comment is necessary other than to observe that the transfers could be deemed to have occurred immediately before the filing of the petition, since both secured claims remained unperfected within the meaning of § 60a(2). However, in view of the court's conclusion that insolvency existed at the beginning of the four-month period it is immaterial in determining the reasonable-cause-to-believe question when the transfers occurred during that time interval.

As an essential element in avoiding a preference, § 60b provides that the creditor must have had reasonable cause to believe that the debtor was insolvent when the transfer occurred. Knowledge or even actual belief of insolvency is not required. Instead, all that need be shown is that the creditor's information about the debtor's financial affairs was such as would incite a person of ordinary prudence to make further inquiry. In that case, the creditor would be chargeable with knowledge of all facts which a reasonably diligent inquiry would have disclosed. 3 Collier ¶ 60.52-56.

It is eminently clear from the evidence that Seaboard had reasonable cause to believe that Cushman was insolvent. At the outset, it is noteworthy in considering this question, that Seaboard's key officers (the Breskys) conducted an unusually exhaustive inquiry immediately after learning of Cushman's precarious financial condition. No information was withheld

nor none overlooked. Actually, their probe was so extensive that the Breskys scrutinized documents and other information which would not have been available to any person other than an insider. And, they were well prepared and qualified to perform this task.

The Breskys were aware that Cushman's type of retail merchandising was fast losing favor with consumers, sales were dropping sharply, and that drastic measures were necessary for continued survival. From past experience in buying and selling bakery equipment, particularly by having liquidated the assets of another comparable bakery facility, they could accurately appraise Cushman's assets, appreciating that much less would be realized in relation to book values if liquidation were directed. Further, their knowledge and understanding of financial affairs enabled them to evaluate Cushman's fiscal records with greater insight.

Thus, as sophisticated and knowledgeable individuals, with long experience in every phase of the bakery business, Seaboard's officers could make an accurate and sound assessment about the state of Cushman's financial condition. Accordingly, this court does not hesitate in concluding that Seaboard should be held chargeable with the knowledge that Cushman was insolvent, despite protestations to the contrary.

Nothing, however, exposes Seaboard's true knowledge of Cushman's insolvency more than the extraordinary terms it imposed for gaining an advantage over other creditors. Negotiating from a position of strength, Seaboard dictated a hard bargain. It reversed a quarter-century business practice by insisting on valuable security to guarantee payment of both past and future indebtedness. Thus assured of payment, Seaboard doubled the volume of flour which Cushman had to purchase until all past indebtedness was paid. Also, to assure that Cushman complied with its demands, Seaboard stopped shipments of flour in transit at a critical point in the negotiations, thereby also forcing payment of a debt which was not due for another thirty days. Again, prompt payment was compelled by another stoppage late in July in order to restrict the total outstanding indebtedness to something less than $100,000, even though

ostensibly the value of the collateral exceeded this amount many times over. Surely, such drastic action would hardly be necessary except in dealing with a company tottering on the brink of financial disaster.

However, the devious manner in which it disguised the transfers for securing the antecedent and future indebtedness unveils what it really knew. In the light of all the circumstances, it is inescapable that such chicanery was compelled as a protective measure because of Cushman's dangerous financial condition, so that other creditors would be lulled into not taking retaliatory action. Its glib explanation about merely wishing to prevent other bakers from learning of the purported loan is completely refuted, as previously explained, by the steps it took to conceal the security arrangement for future purchases of flour and also its reluctance to explain the true nature of the transaction to the trustee and the court. Hence, in the final analysis, Seaboard's self-serving assertion that it did not have reasonable cause to believe that Cushman was insolvent simply lacks credibility.

c. *No Set off Permitted Under Either "net result rule" of § 60c.*

Very little need be said in denying Seaboard's contention that voidable preferences were not received since the shipments made during the four-month period exceeded the payments received from Cushman. Quite plainly, neither the "net result rule"[19] nor § 60c[20] can be invoked by Seaboard for making

[19] According to Collier the "net result rule" is explained as follows:
[W]here, for goods sold and delivered, payments are made on a running or open account between the parties in the regular course of business within the four months' period, without knowledge on the part of the creditor of the debtor's insolvency, and the net result of these transactions is to enrich the debtor's estate by the total sales, less the total payments, such payments or transfers are not preferential even though no corresponding goods are exchanged for the payments made within four months before bankruptcy. 3 Collier on Bankruptcy, 14th ed. ¶ 60.23 at 873.

[20] Section 60c provides:
If a creditor has been preferred, and afterward in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

that comparative calculation, by setting off one account against the other.

The "net result rule" is inapplicable because, as previously found, Seaboard knew or had reasonable cause to believe that Cushman was insolvent during that period. *See* 3 Collier ¶ 60.23. Even more important, to allow a set off would violate the fundamental bankruptcy policy of equality of distribution, the underlying base on which the set off rule is grounded. As the facts indicate, to permit Seaboard to retain what it received in payments during the four-month period and also participate as a creditor in the distribution of the assets to the extent of remaining unpaid balances, it would realize a much greater percentage of its debt than all other creditors of the same class.

Likewise, § 60c is inapplicable because at least two of the requisite elements of that section are lacking. In the first place, Seaboard did not extend credit during the four-month period in "good faith," since Seaboard intended to defeat the policy considerations of the Bankruptcy Act by acquiring assets through a secret arrangement, as previously explained. *See* 3 Collier ¶ 57.19[4.2] at 292. Secondly, as part of this secret arrangement, both Seaboard and Cushman believed that the new credit would be adequately secured. It was not until November 28, 1970, long after the filing of the arrangement proceedings, that Seaboard conceded that the account was unsecured because evidence was lacking to prove that the contemplated assignment of the security documents from Bakers Management had been executed. In any event, it should be noted that § 60c differs from the "net result rule" since only the remaining unpaid balance may be set off. *Grandison v. Nat. Bank of Commerce*, 231 Fed. 800 (2nd Cir. 1916), *cert. den.* 242 U.S. 644. This is significant because, even if a setoff under § 60c were permitted, a large voidable preference would still remain as a basis for disallowance under § 57(g). From any point of view, therefore, the setoff defense is of no avail.

VI. *Order Disallowing Claims.*

In view of the foregoing determinations, it is ORDERED, ADJUDGED, and DECREED that the secured claim asserted by Bakers Management Corporation in the amount of $65,500 be and hereby is declared INVALID since the real and personal property transfers were not properly perfected and in any event were fraudulent; and further, that claim as well as the unsecured claim filed by Seaboard Allied Milling Corporation in the amount of $42,756.99 be and hereby are DISALLOWED pursuant to the provisions of § 57(g), unless voidable preferences in the amount of $108,940.02 are surrendered.

Dated at Portland, Maine, this 25th day of January, 1974.

[s] Richard E. Poulos
U.S. Bankruptcy Judge

Supreme Court, U. S.
FILED
MAR 26 1976
MICHAEL RODAK, JR., CLERK

In The Supreme Court of The United States

OCTOBER TERM, 1975

No. 75-1205

JACOB AGGER,
PETITIONER
v.
SEABOARD ALLIED MILLING CORP.
and
BAKERS MANAGEMENT CORP.,
RESPONDENTS

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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TABLE OF CONTENTS

	Page
Questions Presented	2
Statement of the Case	2
Reasons for Denying the Writ	6
Conclusion	11

TABLE OF AUTHORITIES CITED

Cases

Blennerhassett v. *Sherman*, 105 U.S. 100 (1881) 10-11

Coder v. *Arts*, 213 U.S. 223 (1909) 9

Dean v. *Davis*, 242 U.S. 438 (1917) 10-11

In re Locust Bldg. Co., Inc., 299 F. 756 (2nd Cir. 1924), *cert. denied*, 265 U.S. 590 (1924) 9

Court Rules and Statutes

Bankruptcy Act
§ 67 d(2)d (11 U.S.C. § 107 d(2)d) 7, 9

U.S. Sup. Ct. R. 19 8

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To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The Respondents, Seaboard Allied Milling Corp. and Bakers Management Corp., respectfully pray that the Petition for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on November 25, 1975, be denied.

The citations to the opinions below, the basis for the jurisdiction of this Court, and the statutory provisions involved in the petition have been adequately set forth by the Petitioner.

QUESTIONS PRESENTED

1. Whether the use of a nominee as a secured party renders invalid an otherwise valid real estate mortgage, properly recorded, and a security interest in personal property, properly perfected by the filing of financing statements under the Uniform Commercial Code.

2. Whether the use of a nominee as a secured party converts an otherwise valid real estate mortgage and personal property security interest into a fraudulent conveyance.

STATEMENT OF THE CASE

Cushman Baking Company (hereinafter "Cushman") operated a bakery in Portland, Maine, and Cushman Bakery operated a bakery in Lynn, Massachusetts, both of which had been operating for many years. The Lynn plant closed in 1967. Seaboard Allied Milling Corp. (hereinafter "Seaboard") had been one of the major suppliers of flour to the Cushman companies for thirty to forty years prior to 1967.

Customarily, deliveries to Cushman were made on an open account basis, with payment for each shipment due 30 days after delivery. During the latter part of 1967, the Cushman account was in arrears. On one of his regular visits to Portland, Otto Bresky, Jr., the Vice President of Seaboard who serviced the account, conferred with Charles Carolan, Treasurer of Cushman. Mr. Carolan advised Mr. Bresky that Cushman's problems arose out of the closing of the Lynn plant, and that working capital was tight. Otto Bresky reported the substance of the meeting to Harry Bresky who, as President of Seaboard, handled its financial affairs.

At a meeting which was held in Portland in late November or early December of 1967, at which Charles Carolan, Harry Bresky and Otto Bresky, Jr. were present, Mr. Carolan explained that the Company was consolidating the Lynn and Portland operations and was converting its business from house-to-house to a wholesale operation. Also discussed at the meeting was the possibility of a loan from Seaboard to Cushman of up to $100,000, which Harry Bresky was considering to assist Cushman over the transition period. At the time of this meeting, Cushman owed Seaboard approximately $31,000.

Another meeting was held in late December, 1967 or early January, 1968 at Seaboard's office in Newton, Massachusetts, at which the same three individuals were present. At this meeting it was agreed that Seaboard would lend Cushman $75,000 to be secured by a second mortgage on the real estate and personal property of Cushman in Portland, Maine, and to be further secured by an assignment of a second mortgage on the Lynn plant. At that time Cushman still owed Seaboard approximately $31,000, and it was intended by all present that this would be paid at the time the loan

was consummated. Seaboard also agreed to extend credit of $25,000 to Cushman for the purchase of flour. As part of the loan arrangement, Cushman was to enter into an agreement to purchase at least 50,000 cwt. of flour annually so long as any balance on account of the loan remain unpaid. The loan would be made and the security taken in the name of Bakers Management Corporation (hereinafter "Bakers"), a Massachusetts corporation which customarily acted for Seaboard in loan transactions to Seaboard's customers. It was also contemplated that Seaboard would be secured for future flour deliveries by assignment of an interest in the security, but since the contemplated assignment was not made, Seaboard conceded at the initial hearing that its claim was unsecured.

The loan documentation was prepared by counsel for Seaboard and by counsel for Cushman. By the terms of its existing first mortgage, held by Union Mutual Life Insurance Company (hereinafter "Union Mutual"), Cushman was required to obtain the consent of Union Mutual in order to make the loan. Such consent was obtained by Cushman and evidenced by an agreement dated February 12, 1968, which included as attached exhibits a copy of the proposed note and security documents to be given to Bakers and a copy of the proposed flour purchase agreement with Seaboard. There was no evidence that either Seaboard, Bakers, or their counsel participated in any way in the effort to obtain Union Mutual's consent to the loan.

Seaboard continued to ship to Cushman flour ordered by Cushman subsequent to the meeting at which the loan was agreed upon, with the result that on the date of the loan closing, March 6, 1968, the amount of the indebtedness due from Cushman to Seaboard for flour had increased to

$61,873.45. There were also two shipments of flour that had ben stopped in transit, which were to be billed at $12,078.22.

The loan was closed on March 6, 1968, in Portland. At the closing, the $75,000 note payable over a period of three years was delivered against delivery of a check of Bakers Management Corporation in like amount, and the security documents were delivered and recorded. Cushman paid to Seaboard the sum of $73,961.67, which represented the outstanding indebtedness of $61,873.45 and the price of the two cars stopped in transit, $12,078.22. The two cars were immediately released.

Subsequent to the loan closing, Seaboard continued to ship flour to Cushman on a regular basis and continued to receive payment for some of its shipments. In addition, payments were made on account of the $75,000 note, reducing the principal balance to $65,561.31. Interest was paid through June 16, 1968.

On August 13, 1968 the present bankrupts filed original petitions in the District Court of Maine under Section 322 of Chapter XI of the Bankruptcy Act for an arrangement with their unsecured creditors. On June 2, 1969, after it became apparent that a plan could not be proposed, they were adjudicated bankrupt in the pending Chapter XI proceedings. Thereafter, within the period provided, Seaboard and Bakers filed Proofs of Claim and petitions to establish liens in the bankruptcy proceedings. On November 16, 1970 the Trustee filed objections to both petitions to establish liens. A hearing was held on the matter on November 19, 1970. Further hearings were held on June 6 and 7, 1972 and July 12, 1972 before Judge Richard E. Poulos in the Bankruptcy Court in Portland, Maine. On June 25, 1974 Judge

Poulos filed an Opinion and Order holding that Bakers' secured claim for $65,561.51 was invalid for lack of proper perfection, and further holding that the transfers were fraudulent conveyances under Sec. 67 d (2)(d) of the Bankruptcy Act. He further held that the trustee's objections to both claims were not barred by the two year Statute of Limitations in Section 11 C of the Bankruptcy Act and disallowed both claims unless voidable preferences aggregating $108,940.02 were surrendered. Seaboard and Bakers filed an Appeal to the United States District Court for the District of Maine. On February 27, 1974 Judge Edward T. Gignoux filed an Opinion and Order reversing the Order of Judge Poulos. The Trustee then filed an appeal to the Court of Appeals for the First Circuit. On November 25, 1975 the Court of Appeals for the First Circuit affirmed the decision of the District Court of Maine that the mortgage and security interest of Bakers' were properly perfected and were not fraudulent conveyances. It reversed the District Court's ruling on the issue of the applicability of the two year Statute of Limitations, but that issue is not involved in the Petition to this Court.

REASONS FOR DENYING WRIT

The writ should be denied because there is no issue presented which meets any of the criteria set forth in Rule 19 of this Court for the exercise of the Court's discretion in granting Certiorari.

The Bankruptcy Judge found that the security interests of Bakers were not perfected. The District Court and the Court of Appeals reversed, holding that the security interests were perfected in accordance with the requirements of Maine law. Petitioner concedes (p. 15 of the Petition) that

this issue (his second question presented) does not constitute a basis for granting Certiorari.

Since the security interests were held to have been properly perfected, and the transfers occurred more than four months prior to the filing of the bankruptcy petition, it is clear that the transfers were not preferences under the Bankruptcy Act. Therefore, Petitioner's statement of the first question presented is not accurate. The issue cannot be whether transfers "with the purpose and effect of concealing . . . the fact that the mortgagee had received a preferential transfer . . ." are void as fraudulent conveyances.

The issue is whether it was error for the District Court and the Court of Appeals to reverse the Bankruptcy Judge's finding that the transfers were fraudulent conveyances.

Respondent submits that this Court should not issue a writ for the purpose of reviewing that question.

It should be noted that it is not the position of Petitioner that there was less than fair consideration for the transfer, but rather that the transfer was made with the actual intent on the part of Cushman to hinder, delay, or defraud creditors and that this intent was well known to Seaboard. Petitioner refers to Sec. 67d (2)(d) of the Bankruptcy Act, which requires proof of an actual intent to hinder, delay, or defraud creditors of the transferor. There was never a finding of fact by the Bankruptcy Judge that Cushman had such intent. In fact, the contrary is true, as Judge Poulos stated,

> That Cushman may not have actually intended to hinder, delay, or defraud creditors is immaterial since Seaboard was in a unique position to dominate or con-

troll the manner in which Cushman's property was disposed. Therefor, it suffices for determining that the transfers were fraudulent to demonstrate that only Seaboard has such requisite intent. (Petitioner's brief, Appendix C pp 83-84).

Clearly, if there had been any evidence of fraudulent intent by Cushman, the Bankruptcy Judge would not have felt constrained to dispense with the necessity of such intent by finding that Seaboard was in control of Cushman, a finding which both the District Court and the Appeals Court agreed was not supported by the evidence.

It would seem that Petitioner has abandoned that position, and now insists that there is proof of debtor's fraudulent intent.

The alleged proof of such intent is nothing more than Cushman's knowledge of, and acquiescence in, the use of Bakers as a nominee of Seaboard. This is the *only* basis for Petitioner's contention that Cushman had the requisite intent. Thus the real question presented is whether the use of a nominee by the secured party required a finding by the Court of Appeals that the security transaction was fraudulent. Respondent submits that the numerous cases cited by both the District Court (Appendix B to the Petition, pp. 50-51) and by the Circuit Court of Appeals (Appendix A to the Petition, p. 35) demonstrate that this is *not* a question of first impression, and, moreover, that the Court's decision that there was no fraud was clearly correct.

Petitioner's argument for the issuance of a writ is based on an alleged requirement that a creditor must disclose potentially preferential transfers. The Circuit Court correctly points out (Appendix A to Petition, p. 35) that there is no such existing requirement of law or public policy.

As the Circuit Court stated,

> A rule requiring the disclosure of potentially preferential secured transactions would present problems of its own. With most preferential transfers there is no possibility of disclosure of the preference to other creditors since there is no public record of the payment of a preexisting debt. Since unsecured potentially preferential transfers would not be affected by such a rule, it may well be questioned whether its limited coverage would be either useful or rationally justified. (Appendix A to Petition, p. 35, footnote 12.)

It has been held by the Court of Appeals for the Second Circuit that the use of a nominee as mortgagee is not a badge of fraud. *In re Locust Bldg. Co., Inc.*, 299 F. 756 (2d Cir. 1924).

Furthermore, in *Coder* v. *Arts*, 213 U.S. 223 (1909), this Court considered the meaning of the expression "intent to hinder, delay, or defraud creditors." The *Coder* case held that actual fraud was required and that the question of fraud depends upon the motive.

> The mere fact that one creditor was preferred over another, or that the conveyance might have the effect to secure one creditor and deprive others of the means of obtaining payment, was not sufficient to avoid a conveyance; but it was uniformly recognized that, acting in good faith, a debtor might thus prefer one or more creditors. 213 U.S. at 242.

Although recognizing this principle, Petitioner contends that one earlier case, *Blennerhassett* v. *Sherman*, 105 U.S. 100 (1881), and one later case, *Dean* v. *Davis*, 242 U.S. 438 (1917), also decided by this Court, somehow change or modify the rule announced in the *Coder* case.

Neither the *Blennerhassett* case nor the *Dean* case changed the *Coder* rule, for in both cases the recipient of the fraudulent conveyances actively participated in a scheme by the bankrupt which actually misled creditors and was detrimental to unsecured creditors. In *Blennerhassett* the transferors actively touted the bankrupt's worth and credit, knowing that their mortgage made him bankrupt and only recording the mortgage when this effort failed to save the bankrupt. In *Dean* the transferee took a mortgage on all of the transferor's property, which mortgage was by its terms overdue and hence in default days before it was taken. The transferee also knew that transferor was using the proceeds other than in the normal course of his business, so that there was no hope that the mortgage could be paid to avoid foreclosure.

In contrast, in the case at bar the mortgage was given and taken in a sincere effort by both Seaboard and Cushman to assist Cushman, an old customer of Seaboard, through a difficult period of readjustment and thus preserve Cushman's business, such preservation being in the best interest of unsecured creditors. If it were taken for any other purpose, would Seaboard have given additional unsecured credit? In fact, would either have continued the business relationship during the period between the agreement to give the mortgage and the actual effectuation of the mortgage in such a manner that the unsecured bill went from $31,000 to approximately $74,000? Respondents contend

that all of the facts in this case point to a good faith effort to rejuvenate a business and not to such sinister motives as were evident in the *Blennerhassett* and *Dean* cases, which are clearly distinguishable.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be denied.

Respectfully submitted,

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